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P R O C E E D I N G S

THE CLERK: Civil action number 3:09CV00620, ePlus, Incorporated versus Lawson software, Incorporated. Mr. Michael G. Strapp, Ms. Jennifer A. Albert, Mr. Craig T. Merritt represent the plaintiff. Mr. Christopher D. Dusseault and Mr. Dabney J. Carr, IV represent the defendant. Are counsel ready to proceed?

MR. DUSSEAULT: Defense is ready, Your Honor.

MR. STRAPP: ePlus is ready, Your Honor.

THE COURT: All right. Good morning.

MR. DUSSEAULT: Good morning, Your Honor.

THE COURT: Are we ready to proceed with your witness, Mr. Dusseault?

MR. DUSSEAULT: Yes, we are, Your Honor. Lawson would call Jonathan Putnam.

Your Honor, we have binders to pass out.

THE COURT: All right.

MR. STRAPP: Your Honor, we would like to pass up copies of redline reports that strike out the sections pursuant to order that Dr. Putnam is no longer allowed to testify about.

THE COURT: All right.

MR. DUSSEAULT: Your Honor, I would note for the record, I haven't had a chance to review the redline

1 prepared by ePlus, but I'm assuming they've done it
2 accurately, and if any inaccuracies come to my attention,
3 I'll let you know. I haven't had a chance to see these.

4 THE COURT: As Judge Williams was fond of saying,
5 we'll abide the event.

6 MR. DUSSEAULT: May I proceed, Your Honor?

7 THE COURT: Please.

8

9 **JONATHAN D. PUTNAM,**

10 a witness, called at the instance of the defendant,
11 having been first duly affirmed, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. DUSSEAULT:

14 Q Good morning, Dr. Putnam.

15 A Good morning, Mr. Dusseault.

16 Q Would you please state your full name for the record,
17 sir.

18 A Yes. Jonathan, middle initial D, Putnam.

19 Q Dr. Putnam, would you please briefly describe for the
20 Court your educational background.

21 A Yes. I received a bachelor's degree, master's degree,
22 and a Ph.D. degree, all in economics, and all from Yale
23 University.

24 Q Dr. Putnam, where are you currently employed?

25 A I'm the founder and a principle at a firm called

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1 Competition Dynamics which is located in the Boston area,
2 and before that when this case started, I was a vice
3 president at Charles River Associates which is another
4 litigation firm also located in Boston.

5 Q Dr. Putnam, have you taught in the field of economics?

6 A Yes.

7 Q Where?

8 A Most recently, I taught at the University of Toronto,
9 faculty of law. I held the -- a professorship in the law
10 and economics of intellectual property at the faculty of
11 law there.

12 I've also taught at Boston University, Vassar College,
13 Columbia University, and Yale College in the fields of
14 intellectual property, industrial organization, and the
15 economics of technology.

16 Q Dr. Putnam, have you received any professional grants,
17 fellowships, honors, or awards for your work in economics?

18 A Yes. I was a Mellon Foundation fellow at Yale Law
19 School where I studied intellectual property law and
20 antitrust. I was a Julia Silver Foundation fellow at
21 Columbia Law School where I studied the economics of
22 technology, and I received a National Science Foundation
23 fellowship based on my dissertation on the value of
24 international patent rights to measure the value of
25 international patent portfolios held by firms.

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1 Q Has your professional work in economics focused on any
2 particular topics?

3 A Yes. I worked exclusively on the economics of
4 intellectual property rights and antitrust since I
5 graduated from college more than 30 years ago.

6 Q Have you authored any books or articles in the field
7 of economics?

8 A Yes. I edited -- most recently edited a volume called
9 Intellectual Property Rights and Innovation in the
10 Knowledge-Based Economy. If you look at the leading
11 encyclopedia of economics under the entry for patent
12 valuation, I authored that entry, and most recently I
13 published a paper on international intellectual property
14 rights.

15 Q Have you authored peer reviews of other scholarly
16 work?

17 A Yes. I've been a reviewer for the *American Economic*
18 *Review*, the *Journal of International Economics*, the
19 *Journal of Industrial Economics*, and maybe a dozen other
20 referee journals.

21 Q Have you testified in court before as an expert
22 witness?

23 A Yes.

24 Q Approximately how many times?

25 A About 20.

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1 Q Dr. Putnam, do you work with both plaintiffs and
2 defendants?

3 A Yes. I would say it's probably tilted a bit more
4 towards defendants, maybe 60/40, but certainly with both
5 of them.

6 MR. DUSSEAUT: Your Honor, I would offer Dr.
7 Jonathan Putnam as an expert in economic and financial
8 analysis in damages pertaining to intellectual property.

9 THE COURT: Any objection?

10 MR. STRAPP: No objection.

11 THE COURT: So accepted.

12 Q Dr. Putnam, on Friday afternoon, the Court heard
13 testimony from ePlus's damages expert, Dr. Ugone, and I
14 understand you were not in the courtroom for that
15 testimony, but I'd like to begin by having you directly
16 address and respond to Dr. Ugone's approach to damages as
17 you understand it from his reports. Is that acceptable?

18 A Sure.

19 Q Now, based on Dr. Ugone's reports, do you have a
20 general understanding of the types of remedies that he
21 offers in this matter?

22 A Yes.

23 Q And what are they?

24 A Well, there's basically three. Dr. Ugone says that
25 the proper remedy is to disgorge what he views as being

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1 Lawson's profits, and he offers three measures of that;
2 Lawson's entire revenues from the sales of the accused
3 configurations, three and five --

4 MR. STRAPP: Your Honor, I'm going to object to
5 this line of testimony. Dr. Putnam was not present in the
6 courtroom when Dr. Ugone testified, and, in fact, there is
7 a sequestration order. So I don't see how Dr. Putnam can
8 fairly comment on what Dr. Ugone said in court on Friday.

9 MR. DUSSEAULT: Your Honor, Dr. Putnam --

10 THE COURT: Excuse me one minute. I don't
11 remember issuing a sequestration order for these
12 proceedings. Did I?

13 MR. STRAPP: It was issued prior to the
14 proceedings that were about to begin a year ago in
15 February of 2012.

16 MR. DUSSEAULT: Your Honor, I need to correct
17 something.

18 THE COURT: Say again, Mr. Strapp.

19 MR. STRAPP: A sequestration order was issued a
20 year ago, before we were about to begin --

21 THE COURT: When the hiatus occurred because of
22 the petition for mandamus; is that what you are saying?

23 MR. STRAPP: That's correct.

24 MR. DUSSEAULT: Your Honor, and to clarify,
25 Lawson specifically moved to be able to have experts in

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1 the courtroom to hear and respond to the testimony of the
2 other experts. That was opposed by ePlus. So what I'm
3 having Dr. Putnam do is explain the opinions as they were
4 articulated in the reports that it's part of his
5 assignment to respond to.

6 MR. STRAPP: To the extent it's just fairly
7 confined to the reports and not to comment on testimony in
8 live court for which Dr. Putnam was not present, I will
9 not object. I'll withdraw.

10 THE COURT: Well, I think the purpose of the
11 sequestration order was -- is generally to have the
12 witness's testimony uninfluenced by -- in substance by the
13 testimony of other people and to be able to address their
14 own views or their facts depending on whether they are
15 fact or expert witnesses.

16 I don't think it's improper to remind the
17 defendant, frankly, what the basic premise was of Dr.
18 Ugone's testimony and then let him comment on that
19 premise, and I don't think that violates sequestration.

20 However, I must say that Dr. Ugone did not offer
21 disgorgement of profits. What he offered was disgorgement
22 of gain and tendered three modes of measuring gain, as I
23 understand it; revenues, gross profits, and incremental
24 profits. Isn't that correct?

25 MR. STRAPP: That's correct, Your Honor.

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1 THE COURT: All right. I think that's what he
2 testified to. He wasn't confining it to profits or he was
3 talking about gain and offered three ways to measure the
4 gain which -- or the quantum of the gain that ought to be
5 disgorged, I guess, is the best way to put it. Did I miss
6 his testimony in that regard?

7 MR. STRAPP: No, I agree completely with the
8 characterization.

9 MR. DUSSEAUT: Your Honor, if I could clarify
10 one point --

11 THE COURT: You can lead him.

12 MR. DUSSEAUT: Yeah, and to be clear, because of
13 the sequestration order and the fact that we were not
14 allowed to talk to Dr. Putnam about what was actually
15 said, he doesn't have any knowledge of what was said.
16 What he's addressing, part of his assignment was to
17 respond to the opinions as articulated by Dr. Ugone, and
18 that's what he's doing.

19 THE COURT: So I guess that's overruled.

20 Q Sorry, Dr. Putnam. Had you finished your --

21 THE COURT: With modifications.

22 Q I'm not -- why don't I ask the question again just so
23 we have it in one piece in the record. What is your
24 understanding, based on Dr. Ugone's reports, of the three
25 measures that he offered?

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1 A Well, certainly keeping in mind the Court's
2 characterization which, I think, is completely right,
3 there were three measures of gain that Dr. Ugone offered,
4 one being Lawson's revenues from the accused
5 configurations; secondly, it's gross profits; and thirdly,
6 what he characterizes as Lawson's incremental profits.

7 Q Dr. Putnam, do you intend to offer any additional
8 measures here today within the confines of Dr. Ugone's
9 disgorgement approach?

10 A Yes.

11 Q And what would those be, just briefly?

12 A Two further ones, one being a correct characterization
13 of Lawson's incremental profits, and then secondly,
14 Lawson's net profits.

15 Q Now, by addressing and responding to Dr. Ugone's
16 disgorgement approach as you understand it from his
17 reports, do you intend to offer the opinion that that
18 approach is an appropriate remedy in this case?

19 A No. The methods -- the whole disgorgement subject
20 turns out to be an inaccurate proxy for ePlus's --

21 THE COURT: Excuse me, Doctor.

22 THE WITNESS: I'm sorry, sure.

23 MR. STRAPP: Your Honor, I'm sorry to interrupt,
24 but I just object to this question and this answer because
25 Your Honor has already determined the disgorgement is an

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1 available remedy in patent-related civil contempt cases
2 and explained why in a memorandum opinion, docket 1032.
3 So I don't think it's appropriate to elicit testimony from
4 the witness that contradicts the settled matter that's the
5 law of the case here.

6 MR. DUSSEAUT: Your Honor, the motion that Mr.
7 Strapp is referring to was the motion to exclude Dr. Ugone
8 from even touching on the subject, and Your Honor ruled
9 that it was an available remedy. Whether within --

10 THE COURT: Whether it's an appropriate remedy is
11 different than whether it's available.

12 MR. DUSSEAUT: Absolutely, Your Honor.

13 THE COURT: Overruled. But to get down to the
14 bottom line fairly quickly, it's my recollection that Dr.
15 Ugone testified that in his opinion, the most accurate way
16 to measure Lawson's gain was the incremental profit mode
17 if I remember correctly. Didn't he end up saying that in
18 response to a question that I asked him?

19 MR. STRAPP: I have a different recollection,
20 Your Honor. I think that his opinion was that you have
21 broad discretion, and he didn't favor or say that you
22 should choose one of the three options.

23 THE COURT: I know he said that at one point in
24 time, but I asked him didn't he think that the right
25 measure of the gain was the incremental profit measure,

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1 and I think he said, yes.

2 The record will speak for itself, but if I'm
3 wrong -- apparently he's thinks I'm wrong, so you can go
4 ahead and develop whatever you want to develop, and we'll
5 have a complete record on it.

6 Q Dr. Putnam, at the time of the objection, you were
7 explaining why you don't believe that Dr. Ugone's
8 disgorgement approach is the appropriate remedy on the
9 facts and circumstances of this case.

10 A Sure. So there's two categories of testimony that I
11 want to discuss, one of them being what's the appropriate
12 measure of profits, and then the second one being -- or
13 gain, and the second one being is disgorgement itself an
14 accurate proxy for the harm to ePlus. And I don't believe
15 that disgorgement itself, by any measure, is an accurate
16 proxy of the harm to ePlus, and we'll talk about that
17 later.

18 Q Thank you. Let's stay for now within a response to
19 Dr. Ugone's disgorgement approach. What steps, if any,
20 are necessary to calculate a disgorgement measure under
21 that approach?

22 A Basically there's two. You've got to identify the
23 revenues in question and measure those accurately, and
24 then you need to deduct the appropriate costs from those
25 revenues to determine what Lawson's gain is.

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1 Q So let's talk first about determining the revenues.
2 Have you prepared a demonstrative to assist you in
3 explaining this step to the Court?

4 A Yes.

5 Q Now, could we please put up demonstrative 702, please.
6 Dr. Putnam, could you please walk the Court through what
7 this demonstrative shows.

8 A Sure. And I think it will be mostly review given what
9 I understand Dr. Ugone's testimony to be, but it's
10 important to be on the same baseline. First step is to
11 identify those customers that have the accused
12 configurations which are numbers three or five. Dr. Ugone
13 and I agree that there are 146 such customers during the
14 contempt period. Having identified --

15 Q Could I stop you there just on that step and ask you a
16 question. When you began your analysis, was the number
17 146 customers?

18 A No. That was -- you mean a year ago?

19 Q Yes, sir.

20 A No, the number was not 146 customers. A year ago,
21 prior to the Federal Circuit's ruling, configuration two
22 was also in the case, and with configuration two
23 customers, the total was approximately 610 total
24 customers. After the Federal Circuit ruling that narrowed
25 the infringed claims, that number dropped to 146.

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1 Q Thank you. Please proceed.

2 A Sure. So we have 146 customers that Dr. Ugone and I
3 agree are the target customers who paid revenues for the
4 infringing or accused configurations. Having identified
5 those customers, then you can go through Lawson's
6 financial records to see exactly how much they paid for
7 the various SKUs or stock-keeping units that make up
8 configurations three and five.

9 So we add together the licensing and maintenance
10 revenues that they paid to Lawson during the contempt
11 period. There are two adjustments to that, both of which
12 are proposed by Dr. Ugone and which I accept. One of them
13 is called the large suite SKU apportionment which deducts
14 from those revenues modules that are not part of the
15 Court's contempt order or injunction order, and secondly,
16 an apportionment to reflect the portion of the foundation
17 software which is called LSF and process flow, the portion
18 of that software that is used for non-infringing modules
19 or product lines.

20 Q And Dr. Ugone did address these subject, so we don't
21 need to belabor them, but roughly what percentage of the
22 large suite SKU revenues is apportioned to configurations
23 three and five?

24 A For large suite SKUs, it's approximately 35 percent.
25 That's the figure that Dr. Ugone used and I accept.

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1 Q And roughly what percent of the LSF process flows
2 revenues are apportioned to configurations three and five?

3 A And it's about 15 percent, and, again, I reach a
4 slightly different number, but it's basically the same.

5 Q And then the third piece of your slide here refers to
6 service revenues?

7 A Yes. So having added up the licensing and maintenance
8 revenue, then one needs to allocate a portion of the
9 service revenue that Lawson also received, which is not
10 tracked on a per-product basis, and so you apportion the
11 service revenues in proportion to the license and
12 maintenance revenues and add that to the total, so at the
13 end of the day, your total is the sum of the relevant
14 licensing, maintenance, and service revenues.

15 THE COURT: In other words, you are using the
16 same 35 percent and 15 percent to apportion the service
17 revenues as you did to the licensing?

18 THE WITNESS: That's correct, Your Honor.

19 THE COURT: And maintenance revenues.

20 THE WITNESS: Yes, Your Honor.

21 THE COURT: Or licensing revenues.

22 THE WITNESS: That's right.

23 Q Dr. Putnam, do you and Dr. Ugone differ in your
24 treatment of licensing revenues received from designated
25 health care customers during the sunset period?

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1 A Yes, there is one difference there, that's right.

2 Q And what is that difference, sir?

3 A The parties have taken different positions on the
4 scope of the injunction and what it means. Dr. Ugone
5 includes revenues that were paid by the health care
6 customers during the sunset period for licensing, and I
7 exclude those revenues based on the respective positions
8 taken by the parties.

9 Q And what is the monetary impact, if any, of that
10 disagreement between you and Dr. Ugone?

11 A The amount of health care revenues that Lawson
12 received during the contempt period from health care
13 customers was about \$900,000, and so that's the magnitude
14 of the difference. However, it's resolved by the Court.

15 Q So, Dr. Putnam, taking this slide as a whole, if you
16 take the two apportionments that you deem to be
17 appropriate and that Dr. Ugone proposed, and you
18 incorporate into the revenue base Lawson's position
19 regarding health care customers, what's the relevant
20 figure of total revenue attributable to configurations
21 three and five that you come to?

22 MR. STRAPP: Objection. Just vague as to time
23 period here.

24 MR. DUSSEAULT: Fair enough.

25 Q For the purposes of this question, I mean through

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1 November 30th, 2012.

2 A Yes, and I'm sure Dr. Ugone made this point, but the
3 data that we have is through November 30th of 2012, so
4 through that date, beginning with the Court's order on
5 May 23rd, 2011, the total revenues are \$21.7 million.

6 Q Dr. Putnam, let's turn to what you describe as the
7 second step of analyzing disgorgement under Dr. Ugone's
8 approach which is to look at the profit margin. Is it
9 correct that to look at a profit margin, what you are
10 looking is whether to deduct particular costs from the
11 revenue base?

12 A Yes. The various definitions of profit differ only in
13 the costs that are deducted.

14 Q And why is it necessary to take this step of deducting
15 certain costs from the revenue base to come up with gain
16 or profit?

17 A Well, as the Court pointed out, we're all trying to
18 get at Lawson's gain, and the gain is the difference
19 between what Lawson took in in revenues and what it had to
20 pay out to make those revenues. So the short version is,
21 you've got to spend money to make money, and if you take
22 in more than you spend, then that's profit. And it would
23 be -- it's only correct to deduct the expenses that Lawson
24 incurred in defining its gain.

25 Q What is the source of information that you and, to

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1 your knowledge, Dr. Ugone use for revenues and costs?

2 A We both relied on profit-and-loss statements produced
3 by Lawson in the course of these proceedings.

4 Q Could we briefly put up demonstrative 703, and
5 understanding all of us have had some difficulty reading
6 the detail of this, I'm not going to ask you to do that,
7 sir.

8 Can you tell me if the two exhibits on this slide
9 represent the profit-and-loss statements that you are
10 referring to?

11 A Well, I can't say I recognize the numbers, but I do
12 recognize the colors, and they do look like the documents
13 that we both were working from, that's right.

14 Q Now, you mentioned earlier that Dr. Ugone proposed
15 measures of revenues and gross profits to measure Lawson's
16 gain; is that correct?

17 A Yes.

18 Q Do you have an opinion, sir, as to whether either of
19 those measures accurately states Lawson's gain?

20 A Yes, I do.

21 Q What is that opinion?

22 A Both of those measures overstate Lawson's gain,
23 because by definition they fail to deduct all of the costs
24 that Lawson incurred in order to make the sales that it
25 made.

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1 Q So with that in mind, have you prepared a
2 demonstrative that identifies the other measures that Dr.
3 Ugone and you have proposed within the disgorgement
4 approach?

5 A Yes.

6 Q Let's take a look at demonstrative 704. Now, within
7 the context of Dr. Ugone's proposed disgorgement approach,
8 both you and Dr. Ugone attempt to calculate what you each
9 describe as incremental profits; correct?

10 A Yes.

11 Q Please describe very briefly for the Court, because
12 the Court heard testimony on this from Dr. Ugone, your
13 view of what the concept of incremental profits means?

14 A So an incremental profit means the profit that one --
15 a firm earns from making an additional sale in the short
16 run, given the understanding that in the short run,
17 certain costs cannot be varied. So it's the increment to
18 profit that occurs from an increment to sales given that
19 certain costs are fixed in the short run.

20 THE COURT: You and Dr. Ugone don't differ in the
21 conceptual articulation of that concept, do you?

22 THE WITNESS: No, we don't, Your Honor, that's
23 correct. It's a very common economic concept, and we
24 would use the word the same way.

25 MR. DUSSEAUT: I would say again, though, Your

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1 Honor, just noting that Dr. Putnam is not aware of what
2 Dr. Ugone may have said in the courtroom.

3 THE COURT: But you just told him.

4 MR. DUSSEAULT: I guess I did, Your Honor.

5 THE COURT: Which is all right. That's how you
6 ask the question. It's okay.

7 Q Now, Dr. Putnam, can incremental profits be analyzed
8 or measured over a longer period of time than, let's say,
9 the short term?

10 A Sure, but the longer the period of time over which you
11 measure incremental profit, the more incremental profit
12 becomes net profit, and the reason why is because costs
13 that are fixed in the short run become variable in the
14 long run.

15 So in the long run, all costs can be changed, all
16 costs are variable, and so there is no such thing as
17 incremental profit, or one would say differently,
18 incremental profit and net profit are the same thing
19 because they deduct the same costs.

20 THE COURT: You mean if I look at the period of
21 time of a couple, three days, incremental profit might be
22 an appropriate measure, but if I look at the same basic
23 figures or parameters but for a period of time of a year,
24 then you don't use incremental profit, you use net profit.

25 THE WITNESS: That's right, Your Honor.

1 THE COURT: Because the cost structure shifts
2 from fixed to variable.

3 THE WITNESS: That's right, exactly. Almost all
4 costs are governed by a contract, and so the contract that
5 governs those costs may be one that can't be varied over a
6 period of days or weeks but can be varied -- like a lease,
7 for example. You would not renew a lease at the end if
8 you were trying to reduce costs, and so whatever the term
9 of the lease is, that becomes variable at the end of that
10 lease.

11 THE COURT: But if you own the building, it
12 doesn't become variable at all except by virtue of what?

13 THE WITNESS: Well, if you own the building, Your
14 Honor, you actually have greater flexibility, because you
15 can sell the building.

16 THE COURT: I know, but you don't. If you don't
17 sell the building, it's a fixed cost, isn't it? You don't
18 determine the value, the categorization of an asset based
19 on whether or not it is alienable in concept, do you?

20 THE WITNESS: No, that's correct, Your Honor.
21 It's purely an economic determination, and so, for
22 example, I own my house, and if I was willing to reduce
23 the price enough, I could sell it almost immediately.
24 It's just a question of what's the economic thing to do.

25 THE COURT: That doesn't change the fact that

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1 it's a fixed asset until -- fixed cost until you, in fact,
2 do the change itself; right? Except for the possibility
3 of depreciation; right?

4 THE WITNESS: Well, the way an economist would
5 say it, I think, Your Honor, is that all costs are
6 variable eventually, and so whether, in fact, it is varied
7 or not is a different question from whether one can vary
8 it or not, and so as long as you hold on to it, is it a
9 fixed cost. That certainly is true.

10 If it's available to be changed, then you may
11 choose to hold on to it, but you've treated it as a, for
12 example, a renewable asset that I keep maintaining rather
13 than disposing of.

14 THE COURT: But in accounting and economics, you
15 don't change the definition of a fixed cost merely because
16 it is susceptible of being changed in its character down
17 the road somewhere varying upon various contingencies, do
18 you? You wait until the contingency occurs, and then you
19 decide it.

20 THE WITNESS: Well, I guess I would say, Your
21 Honor, that it depends on the -- the way an economist
22 thinks about it, and this might different for accounting
23 purposes, but the way an economist would think about it
24 is, do I have the flexibility to alter my expenditures
25 over a certain time period, and so if I have the

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1 flexibility to do that, but I choose not to do that, then
2 I have treated that asset as variable even though --

3 THE COURT: An accountant doesn't treat it that
4 way. You look at the period for which the accountancy
5 occurs, don't you?

6 THE WITNESS: Well, that's true. An accountant
7 -- that's actually a really good point, Your Honor. An
8 accountant would classify the asset based on whether it is
9 possessed and maintained or not. This is, I think, the
10 whole point of why economists provide some value added.

11 An accountant doesn't use the concept of an
12 incremental cost at all. That would never appear on a
13 profit-and-loss statements statement. It's purely an
14 economic construction, and the reason why is because an
15 economist says, let's look at the flexibility that a firm
16 has over a particular time period, recognizing that over a
17 very, very long time period, all costs can be varied
18 regardless of how they're classified for accounting
19 purposes. They can be disposed of, and that's the
20 critical point in --

21 THE COURT: How do you determine -- in a
22 situation, in a world where you consider all costs as
23 potentially variable, what is it that you use to determine
24 when a fixed cost becomes a variable cost?

25 THE WITNESS: The point in time at which you are

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1 able to vary your expenditures on that.

2 THE COURT: And how do you judge that?

3 THE WITNESS: Well, with respect to any
4 particular asset -- that's actually an excellent question.
5 With respect to any particular asset, it could actually be
6 quite a complicated inquiry.

7 THE COURT: Yes, it can. That's exactly my
8 point. In fact, if you're going to use a piece of
9 property as an example, if you own the piece of property,
10 you can't -- you're never going to sell that property if
11 you're in the middle of a down market and don't absolutely
12 have to.

13 So you look at what's the market, what's
14 available, and whether you have to, and then in order to
15 get into that, you have to look at all these other
16 factors, too, don't you?

17 THE WITNESS: You are exactly right, Your Honor.

18 THE COURT: So then isn't the best thing to do is
19 to treat the building as a fixed cost so you don't have to
20 get into the speculative nature of treating it as a
21 variable cost; isn't that, for purposes of the law, an
22 accurate measure?

23 THE WITNESS: I understand the Court's point, and
24 certainly with respect to Lawson, for example, there are
25 going to be literally thousands of assets where one could

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1 go through line by line and say, for what purposes would
2 we consider this asset to be variable or fixed and over
3 what time period and what the contingencies and that sort
4 of thing.

5 Obviously, we don't have anything like that level
6 of detail about any particular asset, and we have to look
7 at how the company, as a whole, manages the whole
8 selection of assets.

9 THE COURT: Okay.

10 Q Dr. Putnam, let me ask just two quick follow-up
11 questions to that. You discussed in response to the
12 Judge's question the distinction between incremental
13 profits and net profits. Is it possible, as an economist,
14 to address the concept of incremental profits over a
15 longer period than the instant, let's say something like a
16 quarter?

17 A Sure.

18 Q And is it possible to address the concept of
19 incremental profits over a defined period of time, not a
20 quarter, but a period of time that may become relevant in
21 the context of a dispute?

22 A Of course. Again, it depends on the time period over
23 which one can actually vary the expenditures.

24 Q Now, the Court asked you a couple of questions about
25 types of costs that might be fixed or variable. In terms

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1 of salaries of employees, as an economist, do you have a
2 general view as to whether those are variable or fixed?

3 A In general, I would say, particularly for a firm
4 like -- software firm like Lawson, they would be treated
5 as variable in the short to immediate run, because one can
6 always terminate or hire employees. There are some
7 transitional costs like severance pay and things like
8 that, but if a firm wants to downsize, for example, it can
9 lay people off, and it can typically do that relatively
10 quickly, usually within a quarter.

11 THE COURT: Well, it can if you're an at-will
12 employee. Can't if you're a contract employee without
13 sustaining costs which you can determine.

14 THE WITNESS: Certainly, Your Honor, and so --
15 if, for example, you had a unionized workforce, your labor
16 costs would be less variable than they would be, say, in a
17 software company where one of the advantages of a software
18 company is the flexibility you have with respect to labor.

19 So I wouldn't want to say all firms are one way
20 or the other. Obviously we're concerned about Lawson, and
21 typically in a software company, most employees are
22 employees at will.

23 Q Does incremental profit properly measured deduct from
24 revenues all variable costs?

25 A Yes.

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1 Q Now --

2 MR. STRAPP: Your Honor, could I just ask for a
3 clarification? That question didn't apply to any
4 particular incremental profits or any company, or was that
5 theoretically incremental profits?

6 MR. DUSSEAUT: Your Honor, I think Mr. Strapp
7 can follow up --

8 THE COURT: You can do that on cross-examination
9 if you want to.

10 Q Now, within the context of Dr. Ugone's proposed
11 disgorgement approach, which I know you've said you don't
12 endorse, both you and Dr. Ugone attempt to calculate the
13 incremental profit; correct?

14 A Yes.

15 Q Now, what's the fundamental difference between your
16 measure of incremental profits and what Dr. Ugone
17 described in his report as an incremental profit?

18 A Well, I think if you -- if we turn back to the
19 demonstrative that's on the screen, this illustrates the
20 contrast, and the effects are different approaches.

21 We both begin with a total accused revenue,
22 recognizing that there are some minor differences in that
23 figure. We both subtract the cost of goods sold which is
24 the cost of actually producing the accused modules. Dr.
25 Ugone then subtracts all of Lawson's sales and marketing

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1 expenses, in other words, treating them all as variable.
2 I, on the other hand, estimate the share of sales and
3 marketing expenses that are variable on a
4 quarter-to-quarter basis. Then I also do the same thing
5 for Lawson's R&D and general and administrative expenses
6 and subtract those.

7 The difference between us is that by subtracting out
8 the additional costs, I arrive at an incremental profit
9 margin of about 26 percent. Dr. Ugone's profit margin is
10 50.9 percent.

11 Q Dr. Putnam, would you please describe to the Court, at
12 a high level, how you went about, as an economist,
13 determining whether Lawson's operating costs are variable?

14 A Sure. So I'm sure the Court's aware, Lawson was a
15 public company, and so we looked at the financials that
16 Lawson submitted to the Securities and Exchange Commission
17 since the year 2000. They've got to file quarterly
18 reports that, among other things, name their revenues and
19 also various categories of their operating costs, in
20 particular the three categories that we discussed here.

21 That gives us a data set that allows us to ask the
22 following question: When Lawson's revenues varied in the
23 past, how did Lawson vary its expenditures in these three
24 cost categories accordingly. And by summarizing the
25 relationship between revenues and the various categories

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1 of operating costs, we can then ask the question, which is
2 relevant to these proceedings, had Lawson's revenues
3 varied by \$21.7 million over the injunction period, how
4 would we expect Lawson to have responded by adjusting its
5 costs if it were to have responded as it has in the past.

6 Q Dr. Putnam, what economic tool, if any, did you use to
7 conduct that analysis?

8 A So any time that you've got a data set like this, and
9 you've got variables that are moving together, economists
10 naturally think to use something called regression
11 analysis which is a statistical tool that describes the
12 relationship between a variable that you want to explain,
13 which, in this case, is the level of costs, and a variable
14 that is doing the explaining, which, in this case, is
15 revenues. So put differently, how much do costs vary when
16 revenues vary.

17 Q Is regression analysis a commonly used tool in the
18 field of economics?

19 A Yes, it's absolutely standard. You are taught this.
20 Now it's taught to undergraduates. When I was in graduate
21 school, it was part of the first year curriculum, and it's
22 used routinely to summarize data and describe
23 relationships between economic variables.

24 Q Now, have you prepared demonstratives to illustrate
25 for the Court the results of your regression analysis

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1 studying the relationship between Lawson's revenues and
2 its operating costs?

3 A Yes.

4 Q Let's turn, if we could, to demonstrative 705. Dr.
5 Putnam, please explain to the Court what demonstrative 705
6 shows, because to me it looks like a lot dots of lines.

7 A Yes. Well, that's, as a matter of fact --

8 THE COURT: Because it is.

9 A Yes. So just to break this down into steps, the first
10 thing I would do is direct the Court's attention to the
11 blue dots which are the -- that's the real world, okay?
12 So what I've plotted in the blue dots on the horizontal
13 axis is Lawson's revenue, and on the vertical axis is --
14 I've taken one category of cost to illustrate this. It's
15 the same for the other two, but to illustrate this, I've
16 used sales and marketing costs.

17 Each blue dot represents the combination of revenues
18 and sales and marketing costs that we observe in one of
19 Lawson's quarterly statements filed with the SEC. So
20 that's real data. That's what actually happened.

21 And then what an economist would like to do given that
22 date is to say, is there a way of summarizing this
23 relationship so that we can say with some degree of
24 confidence or on average, when revenue increases or
25 decreases, how do costs respond to that on average. And

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1 so the fact that the line is upward-sloping tells you that
2 when revenue increases, that sales and marketing costs
3 increase as well. That's what the title of the slide
4 says.

5 Obviously the reverse of that is also true. When
6 revenues decrease, costs also decrease, and then the slope
7 of that line tells you exactly how much costs increase or
8 decrease when revenue increases or decreases. So in other
9 words, it gives you the mathematical relationship between
10 revenue and costs?

11 Q And just in summary, Dr. Putnam, what does this
12 demonstrative show you in terms of the relationship
13 between Lawson's revenues and its sales and marketing
14 costs?

15 A Well, what it shows you is that the dots are clustered
16 very close to the line which means that there is a clear
17 and relatively precisely estimated relationship between an
18 increase in revenues and increase in costs based on
19 Lawson's historical experience.

20 Q Did you perform this analysis for the other categories
21 of operating costs, specifically research and development
22 and general and administrative expenses?

23 A Yes. I did exactly the same thing. I only provided
24 the scatter plot for sales and marketing costs, but the
25 data would look very similar if you did the same thing for

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1 -- if you plotted it for R&D and for G&A also.

2 Q Now, as I look at this scatter plot, I think as you
3 described it, I notice that some of the plot points are
4 higher than the line, and some are lower than the line; is
5 that true?

6 A That's right.

7 Q Does that raise any concerns to you regarding the
8 accuracy of your analysis?

9 A No, not at all.

10 Q Now, explain that. Why not?

11 A So the world, the real world, as the Court has pointed
12 out, is a complicated place, and costs vary for -- in a
13 given period, costs vary for many hundreds of reasons,
14 because individual people are adjusting each quarter their
15 expenditures to the revenues that change as well as to
16 other things that may not necessarily concern revenues.

17 So the way an economist approaches this is to say,
18 we're trying to summarize these complex relationships
19 using a single -- a single coefficient or a single number
20 that says on average, how much do revenues and sales and
21 marketing costs vary together. In any particular period,
22 a firm might undertake an initiative to invest in training
23 its sales personnel, and so expenditures go up, or there's
24 a cost-cutting initiative and expenditures go down.

25 There's lots of reasons why the dots are going to

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1 fluctuate around this line, but the line is a good summary
2 of the average relationship expressed by the dots.

3 Q Now, in his reports, did Dr. Ugone comment on any
4 instances where the point is on or above the line?

5 A Yes. Dr. Ugone made a point in his report -- I don't
6 know what he said in court, but he made the point that --

7 MR. STRAPP: Can I object, Your Honor? This is
8 calling for testimony about Dr. Ugone's report in which he
9 responded to testimony or to the report of Dr. Putnam. So
10 now we're far afield from what Dr. Ugone actually offered
11 as evidence in this court.

12 It's not Dr. Ugone's affirmative opinions. It's
13 Dr. Putnam's response to Dr. Ugone's criticisms of Dr.
14 Putnam's report. So I don't think that's appropriate to
15 draw, especially where there's a sequester order in place.

16 MR. DUSSEAUT: Your Honor, if I may, I think
17 it's appropriate for Dr. Putnam who is offering this
18 analysis to defended it and explain why a concern that the
19 other side raised in its reports, which is what he has to
20 go on, in his view whether it's meritorious or not.

21 THE COURT: Sustained. If they raise it in
22 cross-examination, we can deal with it. If they don't
23 raise it in cross-examination, we don't need to deal with
24 it.

25 MR. DUSSEAUT: Fair enough. Thank you, Your

1 Honor.

2 Q Dr. Putnam, let's turn to demonstrative 706, please.

3 A Sure.

4 Q And the last one may have been a bunch of dots. This
5 one is to be a bunch of numbers. Can you explain what
6 demonstrative 706 is showing?

7 A Yes. This is not a user-friendly version, but this is
8 actually how an economist summarizes a regression in a way
9 that reports the relevant facts about it and allows other
10 people who know how to interpret regressions to assess
11 whether it was done accurately and whether it's reliable.

12 So just to summarize in words the relevant points
13 briefly, it's probably easiest to start on the bottom of
14 the screen with a line that's marked N. N is the number
15 of observations. And so we ask the question, is there
16 enough data to tell us reliably whether there's a
17 relationship between costs and revenues.

18 The answer is yes. For two variables like this, we
19 have 47 observations, 47 quarters, so that's almost
20 12 years of data, and that's more than enough to give a
21 reliable answer in principle.

22 Moving up, the next line is something called adjusted
23 R squared which tells you the answer to the following
24 question: How much of the variation in the various cost
25 categories can we explain using revenues to explain them,

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1 and the answer is somewhere between 85 and 89 percent of
2 the total variation in these categories of expenditures is
3 explained just knowing the revenues. So in other words,
4 if you know how much Lawson sold, you have a very good
5 idea of how much they spent.

6 Moving up one further line, those numbers in
7 parentheses tell you the degree of precision with which we
8 have our estimates, and so they answer the following
9 question: Are the results statistically significant,
10 meaning if someone said, how do you know that the true
11 relationship is not zero, how do you know that you haven't
12 been fooled into believing that there's a relationship
13 when there isn't one, these numbers tell you that you
14 haven't been fooled and that your estimates are
15 statistically significant which means you can reject the
16 claim that the true relationship is zero.

17 This is important because Dr. Ugone, in fact, makes
18 exactly this claim for R&D and G&A and says the true
19 relationship between sales and these cost categories is
20 zero. We can say that it is statistically certain that
21 that relationship is not zero.

22 MR. STRAPP: Your Honor, I object, and I move to
23 strike. He's commenting on Dr. Ugone's testimony. It's a
24 mischaracterization of what was said in court. Dr. Putnam
25 wasn't present, didn't hear what Dr. Ugone's said, and

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1 it's also not present in his expert report either. So I
2 would move to strike that testimony as an inaccurate
3 characterization of what was said by another expert,
4 either in the report or in the live testimony in court.

5 THE COURT: Where does it appear in his report?

6 MR. DUSSEAUT: I'm sorry, Your Honor.

7 THE COURT: He said it didn't appear in his
8 report. Where does --

9 MR. STRAPP: I'm specifically referring to the
10 last statement that Dr. Putnam said about the fact that
11 zero dollars of product and development is varying with
12 respect to -- revenues with product and development can't
13 be explained by cost with respect to product and
14 development. I don't think that appears --

15 THE COURT: Why don't you slow down a little bit.
16 I'm having trouble following, and I know the court
17 reporter must be.

18 MR. STRAPP: Your Honor, maybe I could start
19 again. I think what I'm -- the point of my objection is
20 that Dr. Putnam is commenting on testimony that Dr. Ugone
21 gave, which Dr. Ugone actually didn't give, and he's also
22 trying to characterize it as being present in Dr. Ugone's
23 report, and I feel like the characterization wasn't a fair
24 characterization of what's actually in Dr. Ugone's report.

25 THE COURT: I understand, okay.

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1 MR. DUSSEAULT: On this issue, Your Honor, ePlus
2 moved to keep Dr. Putnam from hearing what was said in the
3 courtroom. Part of Dr. Putnam's assignment is to respond
4 to the opinions to be offered by Dr. Ugone which he does
5 based on the reports.

6 So what he is talking about is the reports. In
7 his report, he talks about the different ways in which
8 they measure incremental profits and notes, as Dr. Ugone
9 did say, that he treats R&D and G&A as fixed. And he
10 doesn't -- he treats 100 percent of the sales and
11 marketing as variable.

12 He addresses that, and he explains why the better
13 approach is to look at the variable portion of each. It
14 was at ePlus's own insistence that his opinion is based on
15 the reports and not based on testimony that ePlus said
16 they didn't want him to hear.

17 MR. STRAPP: Your Honor, I feel like this is an
18 inappropriate characterization of Dr. Ugone's testimony.

19 THE COURT: I think the way to solve this is not
20 to ask the question with respect to the report. Just ask
21 him what his opinion is on a topic, and then you can
22 compare it when you do your papers to whatever he said,
23 Dr. Ugone said.

24 MR. DUSSEAULT: So, Your Honor, I can ask Dr.
25 Putnam what Dr. Ugone's opinion was?

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1 THE COURT: No. You ask him his opinion on a
2 topic; in other words, do you think the car was going
3 35 miles an hour. Let's suppose that Dr. Ugone has said,
4 I think the car is going 82 miles an hour, and you ask him
5 not do you think Dr. Ugone is right, you just ask him the
6 question what is your opinion as to whether the car was
7 going 35 miles an hour, and then I can decide which one of
8 the experts I want to believe when you compare them in
9 your papers.

10 MR. DUSSEAULT: Your Honor, the only issue I'd
11 raise is Dr. Ugone is a defense expert. Part of his
12 assignment --

13 THE COURT: He's a what?

14 MR. DUSSEAULT: He's a defense expert in this
15 case. He's the defendant's expert. He did his report
16 after Dr. Ugone.

17 THE COURT: You mean Dr. Putnam is.

18 MR. DUSSEAULT: I'm sorry, Dr. Putnam is a
19 defense expert. He was retained, in part, to address the
20 opinions expressed by Dr. Ugone and respond to them. And
21 so part of his affirmative opinions is, in fact, to
22 comment on what Dr. Ugone has said.

23 We moved the Court to allow him to hear what was
24 actually said in court so that he could speak to that, but
25 to a certain point, Your Honor, I think we need to have

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1 latitude for him to be able to respond to the only
2 opinions that he was allowed to hear which are those -- to
3 which he should have been confined in court anyway.

4 MR. STRAPP: And, Your Honor, if I could make one
5 point on that. It's actually interesting. Even though
6 Dr. Ugone submitted the first report, it was Dr. Putnam
7 who was the first one to issue an affirmative opinion
8 regarding incremental profits.

9 So in this instance, it's not that Dr. Putnam's
10 responding to Dr. Ugone's opinion on incremental profits,
11 it's the opposite. So I feel like that's an inaccurate
12 characterization of this portion of Dr. Putnam's
13 testimony.

14 MR. DUSSEAUT: I hear Mr. Strapp's point. It's
15 an inaccurate one for this reason as Mr. Strapp knows.
16 The parties did supplemental reports. In the first
17 supplemental report, Dr. Ugone used this approach where he
18 treated G&A and R&D as fixed.

19 Dr. Putnam then responded. He said, my
20 assignment is to respond, and he responded. So because
21 the parties supplemented reports, it's absolutely part of
22 his response.

23 MR. STRAPP: And, Your Honor, I would just say --

24 THE COURT: I think the first solution I set upon
25 is the right one, and you all just proved it to me.

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1 MR. DUSSEAULT: I'll try and follow that lead,
2 Your Honor.

3 Q Dr. Putnam, were you done discussing your own analysis
4 of the regression and what demonstrative 706 shows?

5 A Not quite yet, so just to finish up the previous
6 point, the numbers in parentheses test the claim --

7 THE COURT: Excuse me. I, therefore, strike Dr.
8 Putnam's answer with respect to what Dr. Ugone said. All
9 right.

10 THE WITNESS: So that's fine. That's fine. The
11 hypothesis to be tested when one says something is
12 statistically significant is, is the true relationship
13 zero, and to say that something is statistically
14 significant is to say, in this case, that the true
15 relationship is not zero, it's something else. And that
16 is what's demonstrated by the numbers in parentheses.

17 So the something else that it is, which is the
18 only thing we really care about for these proceedings, is
19 the numbers shown in yellow under the line revenues.
20 That's the portion of -- or the share of revenues that
21 vary for each of these cost categories, and it's those
22 numbers we're going to carry forward into the rest of the
23 analysis.

24 So just to be concrete, in the sales and
25 marketing column, we see the number 0.177. What that

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1 means is that for every increase of \$1 in revenues, there
2 is a 17.7 cent increase on average in sales and marketing
3 costs, or more generally, if revenues go up by a certain
4 percentage, costs go up in the sales and marketing column
5 by about 17.7 percent of that percentage.

6 These the numbers that we're going to carry over,
7 because these are the ones that show us the portion of
8 these cost categories that are variable.

9 MR. DUSSEAULT: Thank you, Dr. Putnam.

10 THE COURT: This just shows companywide; right?
11 It doesn't show product by product.

12 THE WITNESS: That's right, Your Honor.

13 THE COURT: In other words, you don't know
14 whether, and we can't tell from anything we've got,
15 whether the costs -- whether from the revenue of selling
16 the configurations three and five the costs went up or
17 incurred per dollar was point 17 cents; right?

18 THE WITNESS: That's certainly correct.

19 THE COURT: You can't tell that. This is just a
20 companywide figure to which we would conceptually -- which
21 we would conceptually use as a proxy for a particular
22 situation, in this situation whatever the gain was on
23 configuration three.

24 THE WITNESS: That's exactly right, Your Honor.
25 We only have companywide data for costs of any kind.

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1 Q Dr. Putnam, in coming to your opinions, did you
2 consider any testimony from Lawson about the
3 reasonableness of using companywide data as a proxy for
4 the cost data pertaining to configurations three and five?

5 A Yes.

6 Q What information did you consider?

7 A In particular, I spoke with Mr. Samuelson, who is the
8 CFO, and asked him this question: Is it fair to treat
9 companywide data as a proxy for the sales of the accused
10 configurations and the accused modules, and he said that
11 there was no reason not to treat these modules as being
12 typical of the broader set of products sold by the
13 company.

14 THE COURT: And you relied on that in forming
15 your opinion as to the incremental profit figure that you
16 offered.

17 THE WITNESS: Yes, Your Honor.

18 Q Did you also rely on deposition testimony in forming
19 your opinion as to incremental profit and what costs of
20 Lawson were variable?

21 A Yes. I spoke with both Mr. Samuelson, and I also read
22 his deposition. I forget in which source he said that --

23 MR. STRAPP: Your Honor, I would object to -- let
24 me let him finish the question, because I don't think this
25 is in the report, but I'll let him finish. Go ahead.

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1 THE COURT: I think maybe go ahead. You
2 considered the deposition?

3 THE WITNESS: Yes, I did, Your Honor.

4 THE COURT: His deposition as well.

5 THE WITNESS: Mr. Samuelson's, yes, that's right.

6 THE COURT: At least on what he said there, you
7 thought it was reasonable to use this as a -- the overall
8 damage figures as a proxy for the -- the overall cost
9 figures as a proxy for the costs of the configurations
10 three and five, the modules at issue.

11 THE WITNESS: That's right. There was nothing
12 idiosyncratic about these particular modules that I could
13 see from the testimony.

14 Q Now, what impact, if any, Dr. Putnam, did your review
15 of deposition testimony and your discussion with Mr.
16 Samuelson have on your view of the results generated by
17 your regression analysis?

18 MR. STRAPP: Your Honor, I'm going to object.

19 THE COURT: What are you going object to?

20 MR. STRAPP: This is not in the report. The
21 discussion about Dr. Samuelson's deposition testimony --
22 Mr. Samuelson's deposition testimony and how that supports
23 Dr. Putnam's opinion is relegated to the net profit
24 section of his report. It doesn't have anything do with
25 the incremental profit section of his report.

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1 MR. DUSSEAUT: Your Honor --

2 THE COURT: In other words, he didn't give an
3 opinion on the costs?

4 MR. STRAPP: He gave an opinion on the costs, but
5 in his report he said, Mr. Samuelson provides support for
6 what my opinion is, but he said that with respect to net
7 profit, not with respect to incremental profit.

8 THE COURT: I see.

9 MR. DUSSEAUT: Your Honor, Dr. Putnam identifies
10 as one of the materials he relied upon Samuelson
11 deposition testimony. At page 47 of his first report, he
12 specifically talks about Mr. Samuelson's testimony as it
13 pertains to costs. It's clearly been disclosed.

14 Then in the deposition, Mr. Strapp asked Dr.
15 Putnam more than a year ago to explain in detail all
16 conversations he had with Mr. Samuelson, which he did. So
17 I think it's fair game. It's covered by the report, and I
18 seem to recall this issue also came up with, I think it
19 was Dr. Weaver. There's certainly no prejudice, Your
20 Honor, given that the reliance on this information has
21 been disclosed more than a year ago. There's no
22 prejudice --

23 THE COURT: Well, the analogy to the -- the
24 analogy is the same, I guess, as the validity to which one
25 could ascribe testimony about configuration 28 and -- I

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1 mean claim 28 and claim 26. They're sufficiently
2 analogous points that the data on which he's relying is
3 transferable, notwithstanding that one was offered for
4 claim 28 as opposed to claim 26, and the same analogy
5 would apply here.

6 It's sufficiently connected that he has relied
7 upon it, and it's maybe parsing the rule too tightly to
8 strike the testimony on that basis.

9 MR. STRAPP: Could I make one point, Your Honor?

10 THE COURT: You know the rule of
11 outcome determinative?

12 MR. STRAPP: I do. I just want to --

13 THE COURT: If it's not outcome determinative,
14 most of the time it's better not to deal with it.

15 MR. STRAPP: All right, Your Honor, just one
16 point of clarification. In Dr. Putnam's report, he has a
17 two-page section at the end of a 79-page report -- or
18 three-page section on incremental profits, and that
19 incremental profits section, that three pages of his
20 report, is strictly limited to this regression model.
21 That's the basis for his incremental profits.

22 THE COURT: You can handle that in
23 cross-examination.

24 Q So, Dr. Putnam, let me ask the question again just so
25 the record is clear. What impact, if any, did your review

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1 of the deposition testimony and your discussions with Mr.
2 Samuelson have on how you viewed the results of your
3 economic regression analysis as to the variability of
4 Lawson's costs?

5 A Well, they seem completely consistent. When I spoke
6 with Mr. Samuelson, he said that the way he summarized his
7 view of the variability of costs was that between 80 to
8 90 percent of costs could be varied within two to six
9 weeks of a decision being made of the need to vary those
10 costs.

11 So when I did the regression results, I computed the
12 share of costs that were variable and found that overall
13 about 89 percent is variable which is right within the
14 window he described.

15 Q Dr. Putnam, how did you use the results of your
16 regression analysis to calculate a measure of Lawson's
17 incremental profits here?

18 A Well, so what you want to do is take the numbers that
19 are found in the yellow band on demonstrative 706 and say,
20 this is the portion of revenues or the percentage of
21 revenues that should be treated as variable in the short
22 run, which I take to mean on a quarter-to-quarter basis.

23 So if you add up those three numbers in yellow, 0.177,
24 0.083, and 0.135, you get 39.5 percent. So in other
25 words, 39.5 percent of Lawson's revenues should be treated

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1 as variable costs, variable operating costs on a
2 quarter-to-quarter basis.

3 Q And, Dr. Putnam, what do you calculate Lawson's
4 incremental profit margin to be, if we can go back to
5 slide 704 which we saw earlier?

6 A So if you start with -- just to do the math, you start
7 with Lawson's accused revenue, subtract the costs of goods
8 sold. That gives you the gross margin of about
9 65.5 percent. Then if you subtract the variable sales and
10 marketing, the variable R&D, and variable G&A, which I've
11 together said make 39.5 percent, 65.5 minus 39.5 gives you
12 an incremental profit margin of 26 percent.

13 Q Now, Dr. Putnam, I'm going to shift from incremental
14 profits to the measure of net profit which you've already
15 discussed a bit with the Court. If we could look at
16 demonstrative 707, is this a demonstrative that you
17 prepared to help explain the concept of net profits to the
18 Court?

19 A That's right.

20 Q And you offer a measure of net profits in this case?

21 A Yes, that's right.

22 Q What are net profits?

23 A Net profits are sort of what you would think of
24 naively if you just said, how much money did a firm make
25 from a particular sales activity, because it takes into

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1 account all the costs that the firm incurred in order to
2 make those sales. So in addition to all the cost you've
3 identified previously, the costs of goods sold and the
4 variable sales and marketing and R&D and G&A expenditures,
5 it also subtracts those costs that were treated as fixed
6 in the short run but that could have been varied over a
7 longer decision horizon.

8 So by after subtracting out the fixed costs portion,
9 then -- which amounts to nine percent of revenues, then
10 you reach -- you go from 26 percent profit margin to the
11 net profit which is 17 percent, and that accounts for all
12 of Lawson's costs.

13 Q Do you offer an opinion, sir, as to whether this
14 measure of net profits is an accurate measure of Lawson's
15 gain in the context of this proceeding?

16 A Yes.

17 Q What is that opinion?

18 A Well, actually, I think it's the best measure. It's
19 the simplest and -- conceptually simplest and also the
20 best measure, and the reason why is because the exercise,
21 as I understand it, is that we're contemplating the
22 position Lawson would have been in had it complied with
23 the Court's order on May 23rd, 2011.

24 If it was faced with a permanent loss of revenue as of
25 that date, then it would be making permanent decisions

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1 with respect to the costs that correspond to those
2 revenues. In other words, it would be making a long-run
3 decision rather than a series of short-run decisions.

4 Faced with a long-run decision and the loss of
5 \$21.7 million in revenue, the best way to think about this
6 is that Lawson would have moved to preserve its long-run
7 profit margin of 17 percent and reduced its costs
8 accordingly as it could over time. It couldn't have done
9 that immediately on May 23rd, but it would have done that
10 as expeditiously as made sense.

11 THE COURT: Which is how long?

12 THE WITNESS: I'm sorry, Your Honor?

13 THE COURT: Which is how long?

14 THE WITNESS: Well, it's going -- for the reasons
15 you've articulated, it depends on the particular assets in
16 question. Some of them -- Mr. Samuelson said that between
17 80 to 90 percent of his costs could be varied within a
18 quarter which means -- or two to six weeks.

19 I calculated that about 89 percent could be
20 varied between quarters, and so the remaining 11 percent
21 would take longer than a quarter, and, truthfully, Your
22 Honor, the data don't allow us to say exactly what point
23 in time that remaining 11 percent would have varied.

24 THE COURT: Did you do any looking at whether
25 there have been similar economic consequences to the loss

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1 of \$21.7 million in revenue at any time over the 12-year
2 period you looked at and determine how long it did take
3 them, in fact, to reduce their costs? Did you ever look
4 at that?

5 THE WITNESS: It's a good question, Your Honor,
6 and I did look at -- obviously revenues are fluctuating
7 from quarter to quarter, and so I asked the following
8 question: So \$21.7 million over the injunction period is
9 a reduction of about \$15 million per year, because it's a
10 one-and-a-half-year period.

11 That reduction is about \$4 million per quarter,
12 and Lawson is selling about \$125 million per quarter. So
13 it's a reduction of about three percent in Lawson's
14 revenues or roughly one-sixth of Lawson's profit during
15 that time period.

16 On average --

17 THE COURT: Net profit?

18 THE WITNESS: I'm sorry?

19 THE COURT: Net profit?

20 THE WITNESS: Yes, three percent of Lawson's
21 revenues corresponds to one-sixth of its 17 percent profit
22 margin. So I looked at the fluctuation in revenues, and
23 it turns out that revenues fluctuated, on average, by more
24 than three percent, and I looked to see the speed at which
25 it was able to make these adjustments and determined that

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1 about 89 percent of the adjustment could be made within --
2 from one quarter to the next.

3 I wasn't able to determine how rapidly it was
4 able to make the remainder of that adjustment, and I've
5 had to rely on qualitative testimony by Mr. Samuelson as
6 to how rapidly it could cut its costs --

7 THE COURT: For example, did you look at how much
8 in any one quarter they had actually cut the cost of
9 employees and reduced the employees?

10 THE WITNESS: Well, Your Honor --

11 THE COURT: Their biggest cost is employees.

12 THE WITNESS: Yes.

13 THE COURT: So perhaps a reasonable way to look
14 at it is to say, how long did it take them to cut
15 employees when they were faced with this kind of loss, and
16 I haven't heard -- Mr. Samuelson never did testify to
17 that. He was testifying theoretically and generally, not
18 specifically, and I guess my question is, did you see
19 anything that gave you specific information about how
20 much, for example, they cut their costs, cut their
21 employee costs in any quarter in which they had a
22 comparable loss?

23 THE WITNESS: Yes, Your Honor, and, in fact, it
24 was --

25 THE COURT: Where is that figure?

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1 THE WITNESS: I'm sorry?

2 THE COURT: And where is that actual figure?

3 THE WITNESS: Well, the -- I didn't ask for a
4 number. I asked for the degree of flexibility, and so the
5 specific question --

6 THE COURT: Degree of what?

7 THE WITNESS: The degree of flexibility that
8 Lawson had. In other words, how long did it take to cut
9 employees substantially.

10 THE COURT: You asked Mr. Samuelson this?

11 THE WITNESS: I did ask this question, Your
12 Honor.

13 THE COURT: That's not what I'm asking. I'm
14 asking if you ever tested what Mr. Samuelson told you by
15 looking at any hard data.

16 THE WITNESS: Well --

17 THE COURT: If the answer is no, then say no.

18 THE WITNESS: I didn't do any case studies of
19 individual instances where Lawson had to cut employee
20 costs.

21 THE COURT: I'll tell you the same thing I told
22 Dr. Ugone. A good answer to that question then is no.
23 Thank you.

24 Q Let me ask you one more question on that subject.

25 What is the relationship, if anything, Dr. Putnam, between

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1 the regression analysis that you did and the concept of
2 looking at hard data to see whether costs such as salaries
3 vary over a period of like a quarter?

4 A Well, the -- the hard data tells you at the highest
5 level -- as opposed to doing a case study, the hard data
6 tells you at a high level how did Lawson cut its various
7 categories of expenditures in response to a change in
8 revenues.

9 So some of those employees were lost by the sales and
10 marketing department, some were lost by the R&D
11 department, and some were lost by the administrative
12 section of the company.

13 I asked Mr. Samuelson during the recession how rapidly
14 he was able to cut those costs, and he said, during the
15 recession, we laid off people quickly, within a quarter.
16 So the hard data revealed that in 2007, Lawson dropped its
17 costs significantly in response to a corresponding
18 reduction in revenues.

19 Q Thank you. Now, on --

20 THE COURT: The hard data you are talking about,
21 though, is what Mr. Samuelson told you.

22 THE WITNESS: And the data confirm --

23 THE COURT: No. I just said you relied on what
24 Mr. Samuelson told you.

25 THE WITNESS: Yes, Your Honor.

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1 THE COURT: To reach that conclusion. That's all
2 I'm trying -- that's not hard data to me. That's just
3 testimony. That's his view of things based on how you
4 looked at things, and what I was asking is, did you ever
5 go into the records of the company and see, all right,
6 they had X employees at this time, they had Y employees at
7 this time, and, in fact, they did cut these people for a
8 quarter, not extrapolating from graphs and regression
9 analyses, but checking the hard data. Did you ever do
10 that?

11 THE WITNESS: I did not check employee head
12 counts, Your Honor.

13 THE COURT: All right. That's all I was asking.
14 Q Is your regression analysis based on hard data?

15 MR. STRAPP: Objection; asked and answered. He
16 already testified it was based on SEC data.

17 MR. DUSSEAUT: Your Honor, Your Honor just asked
18 a question about whether his opinions are based on
19 testimony and conversations or data, and my question is,
20 was your regression analysis based on data.

21 MR. STRAPP: Same objection. Asked and answered.
22 That's what we started off with.

23 THE COURT: I think he said it was based on SEC
24 data and what Mr. Samuelson told him.

25 THE WITNESS: Yes. All of those things are true.

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1 Q We'll move on from that. Back on the subject of net
2 profits, sir, do you have a view as to whether it's
3 possible for a cost to be at the same time fixed and also
4 still beneficial to a particular product?

5 A Sure.

6 Q And could you describe that, please.

7 MR. STRAPP: Objection; foundation, Your Honor.
8 There's no testimony or support in the expert reports
9 regarding any opinion about which costs are beneficial if
10 they're fixed or not beneficial if they're fixed. I think
11 it's far afield from this particular economics expert's
12 role and assignment on this case to analyze particular
13 profits, and I don't think it's disclosed in the reports.
14 So I think it's unfair surprise.

15 THE COURT: Where is it closed in the report?

16 MR. DUSSEAUT: Your Honor, when Dr. Putnam talks
17 about why net profit is an appropriate measure, he talks
18 about the fact that --

19 THE COURT: Give me a report and page. That's
20 the simplest way to rule on that objection.

21 MR. DUSSEAUT: Sorry, Your Honor. He has two
22 reports.

23 THE COURT: Sure. Do you know where it is? He
24 might be able to help. Since you wrote it, maybe you can
25 help us out.

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1 MR. DUSSEAULT: That would help me much, thank
2 you.

3 THE WITNESS: I think I'd probably refer the
4 Court to paragraph 82 and footnote 77 of my initial
5 report, Your Honor.

6 THE COURT: Page what?

7 THE WITNESS: Page 44.

8 THE COURT: Footnote 77?

9 THE WITNESS: Yes.

10 THE COURT: He just talks about whether they are
11 costs of doing business and uses that as an example of
12 cost of doing business. That's not an opinion on whether
13 it's beneficial as -- although the cost of doing business
14 conceptually is beneficial if you sell something.

15 I think maybe we don't need to get into this
16 anyway. I don't think it helps his analysis to get into
17 that. Let's go ahead to something else.

18 MR. DUSSEAULT: Your Honor, if I could, I think I
19 found on page 25 of the supplemental report --

20 THE COURT: I don't have that.

21 MR. DUSSEAULT: The supplemental record is in
22 your binder.

23 THE COURT: Which date?

24 MR. DUSSEAULT: March 8th of 2013, sir.

25 THE COURT: I'm sorry. It was hidden back here.

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1 All right, what page?

2 MR. DUSSEAULT: Page 25, Your Honor.

3 THE COURT: What paragraph?

4 MR. DUSSEAULT: It's the paragraph right after
5 the three romanettes, Your Honor. It says for all these
6 reasons --

7 THE COURT: Okay, let me read it. What do you
8 say, Mr. Strapp?

9 MR. STRAPP: I don't see any mention of the word
10 fixed in this entire paragraph, nor do I see any mention
11 of the word beneficial, fixed costs. I don't see any
12 expression of any opinion whatsoever on this page that
13 even bears a relationship to the testimony that was trying
14 to be elicited from the witness, so I think it's really
15 far afield, and if this is the best support that Mr.
16 Dusseault can muster, I would urge Your Honor to strike
17 this testimony.

18 MR. DUSSEAULT: May I be heard, Your Honor?

19 THE COURT: I don't think he's given any
20 testimony yet, has he?

21 MR. DUSSEAULT: May I be heard on the subject?
22 Dr. Putnam is specifically talking about net profit, which
23 is what he's talking about here, and he says that he
24 believes it's the measure that most comprehensively
25 captures the firm's gain because it accounts for the costs

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1 that Lawson actually incurred to earn the revenues at
2 issue in this proceeding. And so what I asked him about
3 was whether costs could be both fixed and beneficial to
4 the product. That's directly related to the concept of
5 whether a measure accounts for the costs that Lawson
6 actually incurred to earn the revenues at issue.

7 THE COURT: I think maybe it conceptually has
8 that relationship, but he didn't say that there, so I'm
9 going to sustain the objection.

10 Q Now, Dr. Putnam, let's go to the next slide. Have you
11 prepared a slide that summarizes the various profit
12 margins and the measure of damages that they result in,
13 sir?

14 A Yes.

15 Q And if you would --

16 THE COURT: Which is that, 14.

17 MR. DUSSEAUT: It's 708, Your Honor.

18 Q Dr. Putnam, if you could, please walk the Court
19 through what Exhibit 708 shows as to the measure of
20 damages, noting that it appears to be for the relevant
21 time period, through November 30, 2012?

22 A Sure. So in red, we have Dr. Ugone's calculations, or
23 my understanding of them I should say, which is that given
24 that we make the same apportionments of revenues, which
25 are called the large suite SKU and LSF apportionments, Dr.

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1 Ugone offers the opinion that the incremental profits are
2 11.7 million during the period indicated.

3 In contrast to that, I make the same apportionments,
4 and having computed the correct incremental profit and the
5 net profit, at margins of 26 percent and 17 percent
6 respectively, the profits on the \$21.7 million in revenue
7 would be 5.6 million and 3.7 million for the two measures
8 of profit that I've calculated.

9 Q Dr. Putnam, you use a daily rate to calculate these
10 measures for the dates beyond which we have the actual
11 data which is November 30, 2012; correct?

12 A Yes.

13 Q Have you prepared a demonstrative for the Court's
14 benefit that shows what the measure would be if one
15 combines the figure through November 30, 2012, with the
16 calculated daily rate up to today?

17 A Yes.

18 MR. DUSSEAUT: And If we could take a look at
19 demonstrative 709.

20 MR. STRAPP: Objection, Your Honor. We haven't
21 had any testimony yet regarding daily rates or what Dr.
22 Putnam's daily rate is, so I don't think it's appropriate
23 to introduce testimony regarding a daily rate without any
24 clarification or basis for how Dr. Putnam calculated a
25 daily rate.

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1 THE COURT: What is the daily rate, I think, is
2 the first question. I see what your objection is.
3 Without knowing that -- I mean, I guess you could go back
4 and do the math, but it would be helpful to have the
5 foundational question asked.

6 MR. DUSSEAU: Sure, Your Honor.

7 Q Have you prepared, Dr. Putnam, a demonstrative that
8 shows the different daily rate measures?

9 A Yes.

10 MR. DUSSEAU: If we could turn to demonstrative
11 717, and if you could direct the Court -- Your Honor, some
12 --

13 Q If you could direct the Court, please, Dr. Putnam,
14 some of these pertain to other measures that you haven't
15 yet addressed, but where on this demonstrative do you set
16 forth the daily rate for Dr. Ugone's disgorgement
17 approach?

18 A Yes. So most of this is a summary slide, so most of
19 this is not relevant at this point, but would I direct the
20 Court's attention to the first column which is listed as
21 large suite and LSF apportionment which means that
22 accepting Dr. Ugone's method of disgorgement, the daily
23 rate using the incremental profit measure is \$12,761.

24 THE COURT: Using the incremental measure that
25 you are arrived at.

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1 THE WITNESS: That's right, Your Honor, and you
2 can see that because I've used the 26 percent profit
3 margin which is in the far right column. So incremental
4 means as I've used that term.

5 MR. STRAPP: Your Honor, could I just ask for a
6 clarification, because I believe that the incremental
7 profit, the daily rate with the apportionments that Dr.
8 Ugone testified to was approximately double the daily rate
9 that's set forth here on this demonstrative, and if I
10 could refer Your Honor to -- I don't know if you have the
11 binder in front of you, but during the Dr. Ugone direct --
12 actually it was during the redirect, Dr. Ugone testified
13 about table two in his supplemental reply expert report at
14 page 15, and in there, he had a figure for incremental
15 profit daily rates of 24,850, and it appears that this is
16 about 50 percent of that.

17 So I don't understand necessarily where Dr.
18 Putnam derived this, if he's trying to calculate a daily
19 rate that would then be used to figure out --

20 THE COURT: As I understand it, Ugone did a daily
21 rate for all of the configurations, and this breaks them
22 out only, I guess. What is the significance of breaking
23 it out, and what's -- what does the 12,761 compare to is,
24 I guess is what he's asking, and I have the same question.

25 MR. DUSSEAUT: Your Honor, I would suggest if

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1 Mr. Strapp wants to ask Dr. Putnam about his figures, he
2 can certainly do that.

3 THE COURT: No, no, no. I'm talking about how he
4 got here, what his predicate is. It doesn't make any
5 sense without understanding what his predicate is.

6 Q Can you describe the --

7 THE COURT: Take him where he has three different
8 figures on the same page.

9 Q Could you please describe for the Court, Dr. Putnam,
10 how you arrive at your daily rate.

11 MR. STRAPP: Your Honor, can I just lodge one
12 additional objection, and that is that I don't believe
13 that this daily rate figure or any of these daily rate
14 figures appears anywhere in Dr. Putnam's report, and
15 that's part of my confusion.

16 I can't reference it and use as a bench something
17 that was in a report, so I have nothing to compare this
18 against. This is coming in for the first time I've seen
19 it. So that's why I'm a little confused as well.

20 THE COURT: Was Dr. Ugone's in his report?

21 MR. STRAPP: Dr. Ugone's was in his report, but
22 Dr. Putnam's, I don't think, is, and that's part --

23 THE COURT: Just a minute. Is the daily rate
24 figure in Dr. Putnam's report?

25 MR. DUSSEAU: It is, Your Honor.

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1 THE COURT: Could you just tell me where it is so
2 we can --

3 Q Dr. Putnam, if you can help me with it, I'd appreciate
4 it.

5 A In what's called Revised Exhibit 3 --

6 THE COURT: Which report are you in?

7 THE WITNESS: In my supplemental report.

8 THE COURT: That's March of 2013?

9 THE WITNESS: That's right, Your Honor.

10 THE COURT: Let me get there. March 2013, and
11 what page?

12 THE WITNESS: There's Exhibit 3, but it's revised
13 Exhibit 3, so please don't be confused by the original
14 Exhibit 3. The title should say Revised Exhibit 3 at the
15 top. It contained an error.

16 THE COURT: It's one of the last two things in
17 the back of the notebook here. I see.

18 THE WITNESS: That's right, Your Honor.

19 THE COURT: All right. And the daily rate is?

20 THE WITNESS: Line F of the exhibit, and you'll
21 see it's an expression in thousands of dollars, and you'll
22 see the first number is 12.76 which is \$12,760.

23 MR. STRAPP: Your Honor, I think I understand now
24 looking at this the confusion here, and I didn't want to
25 get into in yet because it's going to come up later, but I

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1 think I need to lodge an objection now, because this
2 figure is based on an opinion regarding substantial
3 non-infringing uses, and what I think Dr. Putnam is doing
4 is taking out several of the modules of the configuration
5 and looking just at Punchout and EDI and then calculating
6 a daily rate based on revenues from Punchout and EDI.

7 I think that is based on a substantial
8 non-infringing use opinion. That is improper for Dr.
9 Putnam to advocate, and I think we'll get into this in
10 some more detail, because I see this on additional slides,
11 but I need to bring it up now, because I believe that this
12 daily rate figure is apportioned using a substantial
13 non-infringing use opinion that I think is improper for
14 Dr. Putnam to testify to.

15 THE COURT: He is not an infringing use person
16 qualified to testify to that; is that what you are saying?

17 MR. STRAPP: That's one objection. The other
18 objection is there's no foundation in the record --

19 THE COURT: No, let's take that one first. Now,
20 but we know that he could assume X and talk about assume
21 that what X said was correct about non-infringing uses and
22 then give an opinion based on that. Did he do that?

23 MR. STRAPP: He could have -- --

24 THE COURT: Did he do that?

25 MR. STRAPP: He did not do that, and there was X

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1 who said it, so there was nothing for him to assume.

2 THE COURT: Well, I thought X who said it may
3 have been Dr. Ugone.

4 MR. STRAPP: Your Honor, Dr. Ugone did not --

5 THE COURT: In the alternative method that he
6 didn't testify to that came out during his
7 cross-examination.

8 MR. STRAPP: That alternative method was
9 regarding apportionment for LSF and process flow.

10 THE COURT: It had nothing to do with products.

11 MR. STRAPP: Exactly. Had nothing to do with
12 non-infringing uses.

13 MR. DUSSEAUT: Your Honor, I think to say that
14 Mr. Strapp is getting ahead of himself and ahead of us is
15 putting it mildly. There will be testimony about the
16 measure of non-infringing use that's going to be offered.
17 That's not what he's offering here.

18 If Mr. Strapp is trying to say, before Dr.
19 Putnam's had a chance to testify, that this measure is not
20 the daily rate for what he's talking about, that's
21 incorrect. The daily rate that Dr. Putnam has pointed to
22 is the daily rate that he calculates for the measure that
23 he's talking about here, disgorgement of revenues.

24 MR. STRAPP: And, Your Honor --

25 THE COURT: Wait a minute, Mr. Strapp, he's still

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1 talking.

2 MR. DUSSEAULT: These objections, Your Honor, are
3 really Mr. Strapp making points about what he thinks the
4 facts are that are much, much more efficiently handled in
5 cross-examination if he wants to do it that way.

6 MR. STRAPP: Your Honor, I think that this will
7 clarify the issue. If you look at this Revised Exhibit 3
8 that Dr. Putnam is pointing us to, line F is the daily
9 rate incremental, and that's what he -- and that number
10 matches up with a number on the demonstrative.

11 Now, if you move down to the notes and sources,
12 for line F, it says F, here I compute the daily rate by
13 adding to E for each scenario one, two, PNO and PNO plus
14 EDI. And if you refer up to line A, you'll see that PNO
15 is Punchout as fair market value, and PNO plus EDI is
16 Punchout and EDI is the fair market value.

17 So the assumptions for this daily rate
18 calculation are that the only revenue that's relevant are
19 for the modules Punchout and Punchout and EDI as opposed
20 to the configuration as a whole, and what that is is
21 essentially a substantial non-infringing use opinion that
22 the rest of the modules don't matter and that all we need
23 to look at is Punchout and EDI. And I believe that that's
24 an improper opinion both under Federal Rule of
25 Evidence 702 as well as under Federal Rule Civil Procedure

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1 26 and 37.

2 MR. DUSSEAULT: Your Honor, could I just suggest
3 that it might be most efficient to let Dr. Putnam explain
4 his daily rate?

5 THE COURT: Well, his footnote talks about his
6 revenue for health care customers during the delay period,
7 and that's not what we're talking about, is it? I mean,
8 this is revenue for configuration three and five not
9 confined to health care customers, is it?

10 MR. STRAPP: Your Honor, I don't think it's
11 configurations three and five. I think it's some
12 subset --

13 THE COURT: That's what we are talking about
14 here, is configuration three and five not just for health
15 care customers.

16 MR. STRAPP: And not just for the Punchout and
17 EDI modules.

18 THE COURT: Just take one thing at a time, Mr.
19 Strapp. I understand your point about that.

20 MR. STRAPP: Okay.

21 THE COURT: So I guess the question is, there's a
22 lack of foundation about how he got to this daily rate, so
23 we need to ask about that. Sustained.

24 Q Now, Dr. Putnam, you were talking about Revised
25 Exhibit 3. Could you just explain to the Court how you

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1 went about calculating the daily rate that you applied to
2 the measure of remedy or damages for Dr. Ugone's
3 disgorgement approach?

4 A Sure. Maybe I can clear this up. Mr. Strapp
5 expressed the concern that the 12,700 --

6 THE COURT: Wait a minute. Don't be addressing
7 his objection. You go ahead and answer the question, if
8 you would. How did you calculate the daily rate, I think,
9 is what we're getting at.

10 THE WITNESS: Thank you, Your Honor. The daily
11 rate is calculated by computing the profits, either
12 incremental or net, that were earned per day during the
13 injunction period. That's all it is. It's the average
14 rate of profit per day during the injunction period with
15 the two apportionments we've discussed, large suite SKUs
16 and LSF and process flow but no further apportionments.

17 Q Does your calculation of daily rate, Dr. Putnam,
18 exclude any modules?

19 A No, it doesn't.

20 Q Are these figures that you are pointing the Court to
21 here, the 12.76 and 8.33, are those the daily rates that
22 are basis for your calculation of a daily rate to apply to
23 your damages through November 30 for Dr. Ugone's
24 disgorgement approach?

25 A Yes, that's right. Those are found written out in

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1 full on demonstrative 717, and the numbers are \$12,761 per
2 day for the incremental profit rate and \$8,329 per day at
3 the net profit rate. If one were to add these --

4 THE COURT: Wait a minute. Let me get back
5 there, if you will.

6 THE WITNESS: I'm sorry, Your Honor.

7 THE COURT: Seven --

8 THE WITNESS: 717.

9 THE COURT: 12,761 for the incremental?

10 THE WITNESS: That's correct, Your Honor.

11 THE COURT: And net is 8,329.

12 THE WITNESS: That's right, Your Honor.

13 THE COURT: And that's the first column under the
14 heading large suite and LSF apportionment on 717.

15 THE WITNESS: That's right, Your Honor.

16 THE COURT: So that's the daily rate you are
17 talking about that is equivalent to the daily rate that
18 Dr. Ugone testified to.

19 THE WITNESS: Conceptually the same, exactly.

20 THE COURT: The difference being that you are
21 using a different figure for the incremental profit that
22 you -- and the net -- and then there's a figure for the
23 net profit.

24 THE WITNESS: That's right.

25 THE COURT: That's the difference in that column

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1 of this demonstrative.

2 THE WITNESS: That's exactly right.

3 THE COURT: Is that the part you are offering
4 now?

5 MR. DUSSEAULT: Yes, it is, Your Honor.

6 THE COURT: You just turned there saying -- you
7 turned when you began this questioning to this exhibit
8 saying where is it so he could explain the rate but said
9 also there are other things on there we're not going to
10 get into yet.

11 MR. DUSSEAULT: Yes.

12 THE COURT: And we're not into it yet.

13 MR. DUSSEAULT: That is absolutely correct, Your
14 Honor.

15 THE COURT: Thank you. Now, do you have any
16 objection to that testimony?

17 MR. STRAPP: I understand it now.

18 THE COURT: Okay, thank you.

19 Q And just one last question on this. To the extent the
20 dollar figure of the daily rate is lower if we're looking
21 to Exhibit 717, to the extent the dollar figure of the
22 daily rate, daily rate number one incremental, is lower
23 than something that Dr. Ugone may have testified to about
24 incremental, is that accounted for by the fact that your
25 incremental figure and Dr. Ugone's are different?

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1 A Yes. Mr. Strapp pointed out that Dr. Ugone's figure
2 is approximately twice as high, but that's because Dr.
3 Ugone's profit margin is approximately twice as high. And
4 so if you have the profit margin, you're going to have the
5 daily rate.

6 Q Thank you.

7 THE COURT: Are you through with that part of
8 your testimony right now?

9 MR. DUSSEAULT: I was going to bring him back
10 just quickly to the slide that started all of this, Your
11 Honor, 709.

12 THE COURT: As long as we can do that and then
13 change court reporters.

14 MR. DUSSEAULT: Yes, we can change quickly.

15 THE COURT: Seven what?

16 MR. DUSSEAULT: 709.

17 THE COURT: All right.

18 Q Now, is slide 709 the demonstrative, Dr. Putnam, that
19 reflects the measures of damages if carried out to today's
20 date?

21 A Yes. 709 and 708 are identical except for the fact we
22 added the daily rate since November 30th, 2012, and so we
23 get the numbers that we see on 709. So just to be clear,
24 through today, if one accepts the -- calculates Lawson's
25 revenues through today, the incremental profit on those

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1 revenues would be 7.3 million, and the net profit would be
2 4.8 million.

3 THE COURT: And if you use Dr. Ugone's figures,
4 it's 15.

5 THE WITNESS: That's correct.

6 THE COURT: Is that a good place?

7 MR. DUSSEAULT: It certainly is, Your Honor.
8 Thank you.

9 THE COURT: We'll take a 20-minute recess. How
10 much longer do you have, Mr. Dusseault?

11 MR. DUSSEAULT: It's already taken longer than I
12 thought it was going to be, Your Honor. I would guess 20
13 to 25 minutes.

14 THE COURT: We will be in recess.

15

16 (Brief recess.)

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1 THE COURT: All right.

2 MR. DUSSEAUT: May I proceed?

3 THE COURT: Please.

4 BY MR. DUSSEAUT: (Continuing

5 Q Dr. Putnam, I'd like to move at this point from
6 your discussion of the correct measures under Dr.
7 Ugone's disgorgement approach to any other opinions
8 that you have offered in this case.

9 Are you aware that Lawson has taken the position
10 in this case that configuration numbers 3 and 5 have
11 both infringing and non-infringing uses?

12 MR. STRAPP: Your Honor, I object. Lawson --
13 I think that's unfair characterization because I don't
14 believe Lawson has any evidence in the record that
15 there are substantial non-infringing uses. So whether
16 or not their attorney takes that issue I think is
17 irrelevant here. So I object on relevance grounds.

18 MR. DUSSEAUT: Your Honor, on ePlus's
19 motion, Dr. Putnam has been excluded from hearing
20 what's actually in the record. He's offered opinions
21 based on what he was told about the positions of the
22 parties, and he's offering measures that the Court can
23 use based upon those.

24 THE COURT: I agree with that, but I guess
25 the basic question at this juncture is: Has anybody

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1 ever testified to a non-infringing use? And I
2 believe, if I remember correctly, Mr. Thomasch took
3 the position that it was undisputed that there were
4 non-infringing uses. So if there isn't any testimony
5 about it, then if it's not disputed, then it can still
6 come in.

7 So (A) is it disputed take there are
8 non-infringing uses?

9 MR. STRAPP: It's disputed, Your Honor.

10 THE COURT: Okay. (B) who testified that
11 there were non-infringing uses, Mr. Dusseault?

12 MR. DUSSEAULT: Your Honor, I believe there
13 was testimony in Dr. Weaver's testimony, both on
14 direct and cross, that we believe establishes that
15 there are non-infringing uses.

16 THE COURT: So you're saying that you think
17 Weaver is the predicate for it?

18 MR. DUSSEAULT: I don't want to say, Your
19 Honor, that it's exclusively so, but I believe that I
20 heard testimony from Dr. Weaver suggesting that there
21 are ways in which configurations No. 3 and 5 can be
22 used without practicing the method.

23 THE COURT: Didn't he testify to that? I
24 think I recall that he did testify to that.

25 MR. STRAPP: On cross examination, Mr.

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1 Thomasch questioned Dr. Weaver about whether they
2 could be used in certain non-infringing ways. I think
3 that's the extent and universe of the testimony that's
4 come in.

5 THE COURT: Okay. But that's the predicate
6 at least. At least that is a predicate. So the issue
7 then will be: Is it sufficient? But that doesn't
8 preclude this witness from expressing economic
9 opinions on the basis of assumptions predicated on the
10 testimony that there are non-infringing uses assuming
11 that appropriate foundation is laid as to what he was
12 told and what he's assuming.

13 MR. STRAPP: Your Honor, I don't think that
14 Dr. Putnam in his report referenced anything from Dr.
15 Weaver as a predicate. So I would say to the extent
16 he's going to be testifying about substantial
17 non-infringing uses --

18 THE COURT: Are you closer on this one than
19 you were on the last one because you missed the boat
20 on the daily rate.

21 MR. STRAPP: Dr. Putnam certainly has
22 opinions on non-infringing uses. I'm not disputing
23 that. That's all over his report. That's a
24 substantial basis of his report. All I'm saying is he
25 doesn't explain that that testimony that he wants to

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1 offer today is linked to what Dr. Weaver said on cross
2 examination.

3 THE COURT: Well, I don't know that he can do
4 that. He can make assumptions, and if it's there,
5 it's there. If it's not there, it's not there.

6 Objection overruled. Go ahead, Mr.
7 Dusseault. You have to lay the predicate for it,
8 though.

9 BY MR. DUSSEAULT:

10 Q Are you aware that Lawson has taken the position
11 in this case that configuration numbers 3 and 5 have
12 both infringing and non-infringing uses?

13 A Yes.

14 Q What is the basis for your awareness of that
15 point?

16 A My understanding is that based on the Federal
17 Circuit's narrowing of the claims that the remaining
18 claim in the case is a method patent and that as a
19 matter of liability the apparatus in question can be
20 used both in infringing and non-infringing was, I
21 don't express any opinion about that at all.

22 THE COURT: Do you understand that's Lawson's
23 opinion or position? Is that what you're saying?

24 THE WITNESS: That's correct, Your Honor.

25 THE COURT: Mr. Strapp, what is it?

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1 MR. STRAPP: I was just going to say, Your
2 Honor, to the extent his opinion is based on counsels
3 reading of the Federal Circuit's decision regarding
4 whether there are or not substantial non-infringing
5 uses, I don't think that's a sufficient basis under
6 Rule 702 for him to form an expert opinion.

7 THE COURT: He's assuming that.

8 MR. STRAPP: I understand that, but under
9 702, he has to have a basis for his expert opinion
10 that's reliable, and I don't believe counsel's
11 interpretation of the Federal Circuit's opinion
12 satisfies Rule 702.

13 MR. DUSSEAUT: Your Honor, it's entirely
14 appropriate, I think Dr. Ugone did it as well, for an
15 expert to take an assumption, this is a contention of
16 the parties --

17 THE COURT: We'll deal with the assumption
18 whether it's appropriate or not at a later time.

19 MR. DUSSEAUT: Shall I move on, Your Honor?

20 THE COURT: So you can ask the question.

21 BY MR. DUSSEAUT:

22 Q Let me ask this, Dr. Putnam. Are you offering any
23 measures today that the Court could use if the Court
24 were to find that configuration numbers 3 and 5 have
25 both infringing and non-infringing uses and that

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1 disgorgement of profits should be limited to the
2 profits related to the infringing uses?

3 A Yes, I am.

4 Q How many such measures are you offering?

5 A Two general measures each with two variations.

6 Q Let's take each of your two proposed measures in
7 turn.

8 THE COURT: Do you have any view, Doctor,
9 about which is the right one or the best one? Justice
10 Frankfurter said, "If you have several opinions, if
11 you can't win on your best one, you can't win on any
12 of them." Give me your best one. That's a lot of
13 variations. All right. Go ahead.

14 MR. STRAPP: I just want to put on a standing
15 objection to the line of questioning regarding
16 substantial non-infringing uses so I don't have to
17 keep on jumping up and down.

18 THE COURT: All right.

19 BY MR. DUSSEAUULT:

20 Q Let's put up demonstrative No. 710, if we could.
21 Now, what is the first measure -- how would you
22 describe for the Court the first measure that you have
23 offered in the event that the Court finds that
24 configurations 3 and 5 have infringing and
25 non-infringing uses and that it wishes to disgorge

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1 only the profits limited to the infringing use?

2 A Sure. With respect to the Court's concern about
3 multiple opinions, this is the horse that I'm backing.
4 We'll pull it that way. Generically, if you were to
5 ask the question, What is the value contributed by a
6 particular feature to a system? Then you would look
7 at the price of a system or the market value of a
8 system having that feature, compare that to the market
9 value of a system that was otherwise identical that
10 didn't have that feature, take the difference of those
11 two, and that would be the additional or incremental
12 value provided by the accused feature.

13 So in slide 710, we've just illustrated that. And
14 we have on the left an illustration, in this case of
15 configuration 5, which comprises LSF, process flow,
16 the S3 procurement modules, and then the three
17 requisition modules including the two that define
18 infringing configuration Punchout and EDI.

19 So we look at the market price of an accused
20 configuration, which can be 3 or 5 depending on
21 whether EDI is included or not, we subtract from that
22 the price of a non-accused configuration, which is an
23 otherwise identical system lacking the accused
24 functionality, and then the difference is the benefit,
25 as determined in the marketplace, of the accused

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1 functionality based on the price that sellers, in this
2 case Lawson, are asking, and buyers, in this case
3 Lawson's customers, are willing to pay.

4 Q Are you able to see from the data, Dr. Putnam,
5 both the total price that a customer paid and the
6 price for those particular modules, let's say, that
7 would make up non-infringing configuration 2, as
8 opposed to configurations 3 or 5?

9 A Yes. In this case, it's somewhat unusual. We
10 actually have the price of the underlying components
11 expressed individually.

12 Q What does this analysis lead you to?

13 A So if you actually performed this analysis, the
14 price of an accused configuration minus the price of a
15 non-accused configuration leads you as a residual or
16 incremental value to the price of Punchout or Punchout
17 plus EDI as being the difference in the value of the
18 two systems.

19 Q Now, Dr. Putnam, by doing this calculation, are
20 you taking the position that the infringement, if any,
21 within the system resides only in Procurement Punchout
22 or EDI?

23 MR. STRAPP: Objection, foundation. This
24 witness has not been proffered as an expert on
25 infringement or any technical issues.

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1 THE COURT: I think he's saying he's not
2 doing that. He's establishing the predicate that
3 would be the basis for an objection. He's saying it
4 doesn't exist; isn't that right?

5 MR. DUSSEAUT: And I would have asked it in
6 a leading manner, if I could, Your Honor.

7 THE COURT: I wish you had.

8 Q With that permission, if I could, you're not
9 taking the position, Dr. Putnam, that the
10 infringement, if any, in the configuration depicted on
11 this demonstrative resides only in Procurement
12 Punchout or Punchout and EDI, are you?

13 A No, I'm making an economic statement about the
14 difference in system values, not a technical statement
15 about the location of infringement.

16 THE COURT: Just so I understand it, you're
17 basing your opinion here on the pricing that was set
18 by Lawson for the modules with and without the alleged
19 infringing components; is that right?

20 THE WITNESS: That's right, Your Honor.

21 THE COURT: You're not basing it on sales
22 data as to which customers actually bought or did not
23 buy any such modules as I understand it.

24 THE WITNESS: Well, in the event, Your Honor,
25 with the way you capture that is to look at the price

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1 of the individual modules in question, and then add
2 that up over all customers who had those modules. So
3 the answer is yes, we do. We actually compute the
4 incremental value.

5 THE COURT: No, that's not what I'm asking.
6 I'm asking whether or not you actually looked at
7 figures of people who bought these things. Did you
8 look at the sales figures or are you just saying this
9 is what the modules sell for, and if somebody bought
10 them, this would be the incremental value of the
11 accused functionality in what they really bought?

12 THE WITNESS: I looked at the actual sales
13 figures, Your Honor.

14 MR. DUSSEAUT: I can clarify, Your Honor.

15 Q When you say you look at the actual sales figures,
16 are you looking at the price information for the, I
17 believe it was, 147 customers that are identified as
18 having configurations 3 or 5?

19 A 146 customers. And yes, I looked at exactly what
20 they paid for these modules in question.

21 Q To make sure that it's clear, you're looking at
22 what they paid for the total configuration as they
23 purchased it, let's say, it's a configuration 3,
24 correct?

25 A Yes.

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1 Q Then you're looking at the broken out pricing for
2 the pieces that would make up configuration 2 for that
3 customer, correct?

4 A Yes.

5 THE COURT: But you don't know which way they
6 used it and you're not talking about that.

7 THE WITNESS: No, that's right, Your Honor.
8 That's right.

9 Q To be clear, you're attempting to put an economic
10 measure on the value that they're paying to be able to
11 practice the claim that one can practical by becoming
12 a configuration 3 or -- practice the method, excuse
13 me, that one could theoretically practice by becoming
14 a 3 or a 5, correct?

15 A Yes, and assigning the entire value of the modules
16 in question to Claim 26.

17 Q Now, Dr. Putnam, do you have an opinion on whether
18 this measure of the value that a customer is putting
19 on the additional functionality of being able to
20 practice this method is a conservative one?

21 A I think it is conservative, yes.

22 Q Why is that?

23 A Well, as I just said, by computing the value in
24 this case, one is in effect saying that the entire
25 value of Punchout or Punchout plus EDI is based on the

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1 ability to practice Claim 26. If there were other
2 uses of Punchout or Punchout and EDI that did not
3 practice Claim 26, then they should not be included in
4 this calculation, but conservatively I have included
5 them.

6 THE COURT: Let me ask you so I understand
7 it. Would it make any difference to your opinion if
8 you knew that the customers who bought configurations
9 3 and 5 actually had the method, had the ability to
10 practice the infringing as well as the non-infringing
11 modes that you base your calculation on?

12 THE WITNESS: No. For these purposes, I have
13 assumed that every time they used these modules, they
14 practiced the method. I don't actually have
15 information on whether they practiced the infringing
16 method or not when they used these modules. So I have
17 assumed that all the uses are infringing. And then
18 the value of the modules captures the value of that
19 use.

20 THE COURT: So it doesn't make any difference
21 to you in your analysis whether a customer is actually
22 using it in the infringing mode so long as there is a
23 non-infringing mode?

24 THE WITNESS: For purposes of this
25 calculation, that's correct, Your Honor. That's

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1 right.

2 Q But if I could clarify, overall for purposes of
3 arriving at these measures, have you assumed that
4 there are both infringing and non-infringing uses that
5 the customer could put the configuration to?

6 A Yes, so that the active infringement is not the
7 possession of the system or the sale of the system but
8 the use of the system and, conversely, the nonuse of
9 the system.

10 THE COURT: You're assuming that a sale is
11 not an infringement; is that what you're saying?

12 THE WITNESS: For the method claim in
13 question, yes, Your Honor.

14 Q Now, you, in this approach, this incremental value
15 of accused functionality approach, you're ascribing
16 the entire value of the difference that a customer
17 pays to have configuration 3, which can practice the
18 method, versus configuration 2 which cannot, you're
19 ascribing the entire value of that difference to
20 practicing that method?

21 A That's right.

22 THE COURT: Excuse me. When you say you're
23 assuming that a sale doesn't infringe, are you
24 including the securing of a license in the word
25 "sale"?

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1 THE WITNESS: Your Honor can appreciate this.
2 Not being a lawyer, this is getting into areas that
3 I'm not comfortable with.

4 THE COURT: Well, I'm asking you about what
5 you are comfortable with. In other words, are you
6 distinguishing between licensing and sales?

7 THE WITNESS: No, Your Honor, I'm not.

8 THE COURT: So to you a license is the same
9 as a sale?

10 THE WITNESS: For the purposes of these
11 calculations.

12 THE COURT: For your calculations.

13 THE WITNESS: Exactly, yes, Your Honor.

14 Q Have you prepared a demonstrative for the Court
15 that shows the -- actually, strike that.

16 You mentioned to the Court that you offered two
17 measures under each approach. Can you just explain
18 very briefly the difference in the measures?

19 A Sure. The reason for the variation is that -- the
20 question is, with respect to EDI, and how one treats
21 EDI as being a module that is necessary to the
22 infringement, one could argue that because
23 configuration 5 incorporates both Punchout and EDI,
24 that EDI should be treated as a module that is,
25 obviously, part of the infringing configuration.

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1 On the other hand, EDI, by itself, apparently, is
2 not considered infringing because it was part of
3 configuration 4, which the jury originally found not
4 to be infringing.

5 MR. STRAPP: Objection, Your Honor. I'm
6 going to move to strike that testimony. This is under
7 a different basis. This is under the basis that in
8 the motions concerning the testimony that Dr. Weaver
9 and Dr. Goldberg would be allowed to talk about, Your
10 Honor explicitly made clear that we were not going to
11 retread the trial testimony and the jury verdict and
12 try to parse why and why not the jury decided that
13 certain configurations did or did not infringe.

14 (The court reporter had a brief technical
15 problem.)

16 THE COURT: Do you need to go back to his
17 objection since you got interrupted in the middle?

18 THE COURT REPORTER: Yes, please.

19 THE COURT: Okay. Your objection is?

20 MR. STRAPP: My objection is based on the
21 grounds that Your Honor had already stricken and
22 precluded Dr. Weaver and Dr. Goldberg from testifying
23 about the import and impact of the jury verdict and
24 from testifying about --

25 THE COURT: My ruling stands for itself. The

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1 objection is sustained. We don't need him to testify
2 about what any of that means. He can make
3 assumptions, and then if the assumptions are there by
4 the record, we can deal with that. He can't testify
5 about that. He's not qualified.

6 MR. DUSSEAULT: Thank you, Your Honor.

7 BY MR. DUSSEAULT:

8 Q Have you prepared a demonstrative that shows the
9 measures of damages that you arrive at through this
10 incremental value approach?

11 A Yes.

12 Q Let's turn to demonstrative 711, please. Does
13 Exhibit 711 show the measures that you get when you
14 apply the approach with Punchout and EDI or with just
15 Punchout and then apply an incremental profit measure,
16 your incremental profit measure, or your net profit
17 measure?

18 A That's right.

19 Q Now, because the Judge said -- the Court had asked
20 you what your favorite approach was. Is there a
21 particular figure here that you believe is the most
22 accurate measure?

23 A Yes.

24 Q What would that be?

25 A So I, overall, think that the net profit margin is

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1 the right way to think about the gains to Lawson. The
2 only ambiguity that I was trying to take into account
3 was how to treat EDI. So with the assumes that EDI
4 should be included as part of the difference between
5 an infringing and non-infringing system, then I would
6 take the first column and the bottom number, which
7 would be 1.2 million. That's the net profit or
8 Lawson's gain from selling Punchout plus EDI, which is
9 the difference between an infringing system and an
10 otherwise identical non-infringing system.

11 Q I want to talk very briefly about the second
12 approach, but I believe you said that the incremental
13 value approach is the horse you're riding or the horse
14 you're betting on?

15 A That's the one I'm backing.

16 Q The one you're backing. Thank you. So I want to
17 be very brief then on this alternative approach. Have
18 you prepared a demonstrative that summaries the
19 alternative approach?

20 A Yes.

21 Q Could we put demonstrative 712 up, please.

22 Could you explain to the Court -- this has the
23 heading, "Apportionment for Non-infringing Uses." Can
24 you explain to the Court what you've done here?

25 A Sure. Just so the basis of my opinion is clear,

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1 configuration 2 consists of the three boxes, the
2 yellow, the blue, and the green box. In other words,
3 it incorporates RQC, but not Procurement Punchout or
4 EDI.

5 Configuration 3 adds Procurement Punchout, the
6 gold box. And configuration 5 adds the purple box,
7 which is EDI.

8 What I want to do is get some measure of how a
9 system that incorporates the two additional modules,
10 that convert a configuration into an infringing
11 configuration, the rate at which they're used. So I
12 followed Dr. Ugone's suggestion, which as to apportion
13 the value based on the maintenance payments that are
14 paid for the three modules, two of which can be used
15 in an infringing manner, and one of which when used on
16 its own is not used in an infringing manner.

17 So I took the ratio of expenditures on Procurement
18 Punchout and EDI to expenditures on Procurement
19 Punchout, EDI and Requisition Center or RQC and
20 discovered that that's just under half.

21 Knowing that the value of the two infringing
22 modules or the two modules that convert a
23 non-infringing configuration to an infringing
24 configuration is approximately half, I then
25 apportioned all of the expenditures by that fraction.

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1 It's actually 46.4 percent for the record. And said
2 that half of the system should be apportioned to the
3 infringing uses and the remainder to non-infringing
4 uses as reflected in the ratio of Procurement Punchout
5 and EDI to the three requisition modules.

6 Q Dr. Putnam, as with your incremental value
7 measure, did you run numbers for this assuming --
8 looking both only at Punchout and then also at
9 Punchout and EDI?

10 A Yes. One can do it either way and I did it both
11 ways.

12 Q Have you prepared a demonstrative that reflects
13 the numbers that are generated when you apply this
14 system apportionment approach?

15 A Yes.

16 Q If we could put up demonstrative 713, please.

17 If you look, the two left-hand columns refer to
18 the incremental value approach, which you already
19 discussed with the Court. Is the system apportionment
20 approach results the third and fourth column, sir?

21 A That's right.

22 Q So that sets forth the measures of damages that
23 you get when you attempt to apportion the value in the
24 manner you just described?

25 A That's exactly right.

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1 Q Do you have an opinion as between the four
2 measures under system apportionment approach as to
3 which is the most accurate?

4 A Well, again, I would say that the one on the lower
5 left, which is 2.4 million, reflects the net profit
6 margin, just a long run decision horizon. And it
7 includes both Punchout and EDI. And so,
8 conservatively, it addresses any ambiguity as to
9 whether EDI itself should be included as an infringing
10 module.

11 Q Now, these figures that are on demonstrative 713
12 are through November 30, 2012, correct?

13 A That's correct.

14 Q One would apply a daily rate thereafter?

15 A That's also correct.

16 Q Could we take a look at a demonstrative we've
17 already seen, demonstrative 717, please.

18 Dr. Putnam, does demonstrative 717 show the daily
19 rates for each of the eight measures that you have
20 offered under the approaches that you have just
21 explained to the Court?

22 A Yes. For all my multiple opinions, the daily rate
23 here is calculated for each one.

24 Q Just so that the record is clear, sir, could you
25 just read into the record what each of those daily

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1 rates is?

2 A Sure. I'll start with the two that I focused on.
3 Under the incremental value approach --

4 THE COURT: Isn't it easier just to put this
5 in the record by having this marked as an exhibit?

6 MR. DUSSEAULT: I'd be happy to do that?

7 THE COURT: Any objection?

8 MR. STRAPP: No objection, Your Honor.

9 THE COURT: DEM 717 has all the daily rates
10 in it. It will be defense exhibit whatever is the
11 next one in order. Anybody know? How about the legal
12 assistants?

13 MR. DUSSEAULT: It would be 759, Your Honor.

14 THE COURT: All right. DEM 717 is admitted
15 as Defense Exhibit 759. It's the daily rate measure
16 for the alternatives. All three of them.

17 (Defendant's Exhibit No. 759 is admitted.)

18 BY MR. DUSSEAULT:

19 Q Dr. Putnam, have you prepared a demonstrative that
20 shows the measures of profits under these two
21 approaches up to today's date applying those daily
22 rates?

23 A Yes.

24 Q If we could look at demonstrative 714, please.
25 Could you just identify for the Court the measures

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1 through today's date for each of the approaches? I
2 think you can focus on the measures that you have
3 identified as the ones you consider most reliable.

4 A Again, under the incremental value approach, which
5 is the approach I think is simplest and makes the most
6 sense, through today's date, the figure would be 1.6
7 million, which is the net profit on the sales of
8 Punchout and EDI.

9 Under the system apportionment approach, which
10 adds to that a portion of the S3 procurement modules
11 and LSF, the number is 3.1 million through today's
12 date.

13 Q Now, I'd like to move onto a final area of your
14 examination, Dr. Putnam. Do you have any opinions as
15 to whether the disgorgement approach proposed by Dr.
16 Ugone provides an accurate proxy or measure for the
17 actual harm suffered by ePlus?

18 A Yes.

19 Q What is that opinion?

20 A All of these measures are poor proxies for ePlus's
21 actual harm.

22 Q Now, can you just very, very briefly describe for
23 the Court what it means as a matter of economic
24 principle to compensate a party for actual harm?

25 A Sure. Compensation simply means restoring them to

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1 the position that they would have occupied absent some
2 change in their state, either positive or negative.

3 Q From an economic perspective, and as a conceptual
4 manner, does looking at and calculating Lawson's
5 profits create or give rise to a proxy of ePlus's
6 actual loss, an accurate proxy of ePlus's actual loss?

7 A No.

8 Q Why not?

9 A You're looking at the wrong party. If you're
10 trying to compensate somebody, you need to look at the
11 state they occupy initially, the state that they have
12 been changed to, and the difference between those two
13 states. We should be looking at ePlus for those
14 purposes. And Lawson's profits bear no relationship
15 to either of ePlus's states.

16 Q If you assume, hypothetically, Dr. Putnam, that
17 ePlus were to lose \$2 million of sale, and as an
18 economic matter you were trying to compensate them for
19 that loss, are you with me so far?

20 A Yes.

21 Q Would it matter to that analysis if you learn that
22 Lawson in engaging in the conduct that's challenged
23 had only earned \$1 million?

24 A No.

25 Q Would there be -- strike that. Let me ask a

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1 corollary.

2 If one were to find that Lawson somehow was able
3 to make \$3 million from the challenged conduct, would
4 that shed any light to you as to the measure necessary
5 to compensate ePlus for its harm?

6 A No, compensation is defined with respect to ePlus
7 and the outcome for Lawson is irrelevant to that
8 calculation. I should say in general. There may be
9 circumstances where it's an accurate proxy, but in
10 general the two have nothing to do with each other.

11 Q Dr. Putnam, have you prepared a demonstrative
12 showing the more specific reasons that you believe
13 that on the facts and circumstances of this case in
14 particular, Lawson's profits do not represent an
15 accurate proxy for ePlus's harm?

16 A Yes.

17 Q Could we take a look at demonstrative 715, please?
18 Now, let's take these in orders, if you would. What's
19 the first reason that you have identified, Dr. Putnam?

20 A Well, the first one is that Lawson could have
21 retained the sales of all modules other than Punchout.
22 So this is really a restatement of the discussion
23 we've had previously, which is that Lawson could have
24 sold a non-infringing module or configuration, in
25 particular, configuration 2.

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1 So the baseline that we should be assuming for
2 Lawson is not zero sales had it complied with the
3 injunction, but the sales that it would have tried to
4 make as a profit maximizing firm in compliance with
5 the injunction. And the baseline, therefore, is a
6 system that is otherwise identical to an infringing
7 system but lacking Punchout or Punchout plus EDI.

8 Given that baseline, Lawson's additional sales
9 would be Punchout plus Punchout and EDI. That bears
10 no relationship to any loss that ePlus has suffered.

11 Q So let me walk through maybe an example or two
12 just to be sure I understand this point. Suppose that
13 a customer has configuration 2 at the beginning of the
14 injunction period. You with me on that?

15 A Yes.

16 Q During the injunction period, that customer in the
17 data it reflects has added Punchout so they now have
18 configuration 3, correct?

19 A Yes.

20 Q What does Dr. Ugone's disgorgement approach assume
21 about what happened to those revenues from the day
22 that that customer adds Punchout going forward?

23 A Dr. Ugone's approach treats all of the revenues
24 from that accused configuration 3 as being a gain to
25 Lawson, even though Lawson was previously earning the

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1 revenues because it had sold configuration 2.

2 So by treating all those revenues as a gain --

3 THE COURT: Excuse me.

4 MR. STRAPP: I believe, Your Honor, that the
5 witness is mischaracterizing Dr. Ugone's opinions.
6 I'm not sure what the basis is for this particular
7 question and answer, especially since Dr. Putnam
8 wasn't here.

9 MR. DUSSEAUT: Your Honor, Mr. Strapp can
10 cross-examine him.

11 THE COURT: I know, but I will say this. The
12 disgorgement remedy is not confined to merely gain
13 deprivation. It is also intended to coerce compliance
14 and to make sure that there isn't any benefit from
15 violating court orders, not that it's punitive, but
16 that its deterrent effect has got to be taken into
17 account. And neither expert can address that question
18 at all.

19 So I don't know that I need to get into this.
20 It's an awful lot -- in addition to that, I've read
21 this 715, and it's sort of repetitive of most of what
22 he said. So I'd like to wrap him up.

23 MR. DUSSEAUT: And I will, Your Honor.
24 Understanding your point, I want to make something
25 clear. What we're intending to do is offer an opinion

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1 in the event that the Court decides after considering
2 all the evidence and in your broad discretion that you
3 want a measure that is a reasonable proxy of ePlus's
4 harm.

5 We're not arguing at this point that that's
6 the only option you have. But we want to see whether
7 this disgorgement is that.

8 If we all agree that disgorgement is not a
9 measure of their actual harm, then I don't think we
10 need to --

11 THE COURT: No, I don't think there's any
12 agreement on that by the other side.

13 MR. DUSSEAULT: I agree. That's why I wanted
14 to have our expert walk through why he believes --

15 THE COURT: I know, but it's repetitive of
16 what he said before. That's one of my points.

17 They have to have a chance to cross-examine
18 him, and I think we need to wrap him up if you don't
19 mind.

20 MR. DUSSEAULT: Very well. Let me just take
21 a quick look, Your Honor.

22 I'll just stop, Your Honor. Thank you very
23 much.

24 THE COURT: All right. Thank you.

25 I have a question before he starts. You

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1 looked at the SCC filings for 12 years, I think. And
2 that's a number of quarters. Or 12 quarters, I guess
3 it was.

4 THE WITNESS: Twelve years or 47 quarters,
5 Your Honor.

6 THE COURT: Twelve years. And the most
7 recent ones, for example, in the last couple of years,
8 did Lawson tell its shareholders or the SCC what its
9 profit was?

10 THE WITNESS: Your Honor, Lawson was taken
11 private in 2011. So it no longer files financial
12 statements with the SCC.

13 THE COURT: Did it say in 2011, the last
14 filing of the SCC, what its profit was, tell its
15 shareholders that or the SCC?

16 THE WITNESS: Yes, it did, Your Honor.

17 THE COURT: What was the percentage? What
18 was the amount?

19 THE WITNESS: I don't know the number off the
20 top of my head, Your Honor.

21 THE COURT: Isn't that the most accurate
22 picture of their profits what they're telling the
23 public and their shareholders?

24 THE WITNESS: The best information I can give
25 you, Your Honor, is what they told themselves in 2012

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1 privately, and the profit margin there was 17 percent.

2 I'm sorry, was 15.8 percent in 2012.

3 THE COURT: But what was it in 2011 when they
4 filed with the SCC?

5 THE WITNESS: I can tell you --

6 THE COURT: That seems -- what they're
7 telling the public seems to me to be the most
8 important component and I haven't heard it. And since
9 you examined the SCC, I thought maybe you could tell
10 me.

11 THE WITNESS: Your Honor, if I could direct
12 your attention, this is the best I can do sitting
13 here, to Exhibit 9 of my supplemental report, the one
14 filed in March.

15 THE COURT: Exhibit 9?

16 MR. DUSSEAU: Which exhibit?

17 THE WITNESS: Exhibit 9.

18 THE COURT: What did they tell -- is that
19 what they told the SCC?

20 THE WITNESS: Your Honor, just to be clear,
21 it was in the middle of 2011 that Lawson went private
22 and so some of these filings will reflect the fact
23 that they filed with the SCC and some do not.

24 THE COURT: What did they say the profit was.
25 It's line what?

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1 THE WITNESS: It's going to be the last fine,
2 line X, Your Honor. And that's going to give you the
3 quarterly profit margin.

4 THE COURT: 15.8, 20.4, 19.1, 14.8, annual
5 18.2.

6 THE WITNESS: That's right, Your Honor.

7 THE COURT: Then they told the shareholders
8 -- they told their -- no, they made statements and
9 said it was what? 17 percent in 2012?

10 THE WITNESS: That's over the entire period,
11 Your Honor. It was 15.8 in 2012 and an average over
12 the two years of 17 percent, which is the number that
13 I used for the net profit margin.

14 THE COURT: 17 percent?

15 THE WITNESS: That's right, Your Honor.

16 THE COURT: And their gross profit is in line
17 L?

18 THE WITNESS: That's correct, Your Honor.

19 THE COURT: All right. Thank you.

20 Do you know what profit figure they used in
21 paying bonuses to executives?

22 THE WITNESS: I'm not familiar with the
23 financial compensation of the executives, Your Honor.

24 THE COURT: Most executive bonuses are tied
25 to a percent of profit, isn't it? Or a lot of it,

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1 isn't it? So you don't know what they did in this
2 case?

3 THE WITNESS: For public companies, it's
4 usually shares of stock that are directly paid because
5 that's in effect a claim on the profits.

6 THE COURT: Right, but you can value that.

7 THE WITNESS: You certainly can, and I don't
8 know what their practices were. It varies actually
9 widely.

10 THE COURT: All right. Go an ahead, Mr.
11 Strapp.

12

13 CROSS-EXAMINATION

14 BY MR. STRAPP:

15 Q Dr. Putnam, you offered some opinions regarding
16 what you call non-infringing uses of configurations 3
17 and 5; is that correct?

18 A Yes.

19 Q You arrived at those opinions by mapping the
20 Federal Circuit's determinations and characterizing
21 those determinations, and then figuring out what your
22 mapping and characterization implied; isn't that
23 correct?

24 A Well, no, I would say that my understanding of
25 non-infringing uses is formed by conversations with

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1 counsel. I obviously read the Federal Circuit's
2 opinion so that I could understand at a lay level what
3 the infringing and non-infringing configurations were.

4 Q Could I ask you, sir, to turn to your supplemental
5 report and --

6 THE COURT: It's right before the numbered
7 exhibit ins that notebook, Dr. Putnam.

8 THE WITNESS: Thank you.

9 THE COURT: What page?

10 MR. STRAPP: Page 6, paragraph 12.

11 THE WITNESS: Yes.

12 Q Do you see that you write at paragraph 12, "Mapped
13 onto the Federal Circuit's infringement and validity
14 determinations, this characterization implies the
15 following distinctions between infringing and
16 non-infringing uses of the two configurations at
17 issue." Now, sir, did I read that correctly?

18 THE COURT: The question is: Did he read it
19 correctly? And you object to that?

20 THE WITNESS: You did.

21 THE COURT: Do you object to that?

22 MR. DUSSEAUT: I object, Your Honor, to the
23 extent he's trying to impeach the witness. It's
24 non-impeaching. The question was based on a different
25 predicate. It was based on a predicate of his

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1 assessment of non-infringing uses. This is a sentence
2 from the background section of his report about the
3 revised scope of Lawson's liability.

4 THE COURT: He's on cross-examination. He
5 can probe it given the nexus between the question and
6 the answer that he's trying to impeach on.

7 BY MR. STRAPP:

8 Q Isn't it correct, sir, that you mapped the Federal
9 Circuit's infringement and validity determinations?

10 Isn't that correct?

11 A As a lay person would, sure.

12 Q And isn't it correct that you characterized the
13 Federal Circuit's infringement and validity
14 determinations?

15 THE COURT: It doesn't say anything about
16 validity here.

17 MR. STRAPP: It does, Your Honor. Paragraph
18 12, the first clause of the first sentence.
19 Infringement and validity determinations.

20 MR. DUSSEAU: Your Honor, it's beyond the
21 scope.

22 THE COURT: It does say that, but read what
23 you're asking.

24 MR. STRAPP: I'm asking --

25 THE COURT: You then went to the next clause

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1 which doesn't deal with validity. It deals with
2 infringement and non-infringement. That's what
3 happened to your question. So ask him again.

4 MR. DUSSEAUT: I would add objection, Your
5 Honor, to the extent it's dealing with invalidity, its
6 entirely beyond the scope.

7 THE COURT: No, I know that.

8 Q Dr. Putnam, did you attempt to characterize the
9 Federal Circuit's infringement determinations?

10 A For the purposes of separating infringing from
11 non-infringing configurations and uses, yes.

12 Q Did you attempt to figure out what your
13 characterization of the Federal Circuit's infringement
14 determinations implies?

15 A I don't understand the question.

16 THE COURT: Did you do what you said in the
17 second clause of paragraph 12, is what he's asking.

18 A Yes. All right. In that, of course, I did, yes.
19 If you're quoting my report, I derived the following
20 implications from reading the opinion, yes, that's
21 right.

22 Q Now, you're not an expert in intellectual property
23 law, are you?

24 A No.

25 Q And you also don't have any degrees in computer

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1 science, do you?

2 A That's true.

3 Q You're not an expert in software or source code;
4 is that correct?

5 A Also true.

6 THE COURT: I don't think they're relying on
7 him as the predicate to establish what is and what is
8 not a non-infringing use. And if he is offering that
9 opinion, he's not been qualified in that area, and,
10 therefore, I would not consider it. But since they
11 haven't offered it, I don't think I need to get there.
12 And to the extent he says anything in his report to
13 the contrary that actually suggests that that's what
14 he's done in arriving at some opinion, perhaps that's
15 appropriate ground for examination. This looks like
16 to me it's a lot of background material in the
17 opinion. At least that's what it looks like on a
18 quick look. I haven't study it carefully.

19 Q Let me follow-up with a few clarifying question.

20 You don't presume to name a specific feature or
21 benefit of RSS or RQC that's unrelated to the patented
22 technology, do you?

23 A I don't presume anything about the technical
24 features. I don't actually understand that question,
25 Mr. Strapp.

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1 THE COURT: Do you know what RSS and RQC is?

2 THE WITNESS: I certainly do, Your Honor. I
3 just wouldn't want to say that I know what it means to
4 be related to the patented technology.

5 Q So, in other words, you don't have an opinion
6 about any specific feature or benefit of RSS that's
7 unrelated to the patented technology?

8 A The only thing I know as an economist is that one
9 can use the system with RSS and not infringe because
10 that's configuration 2. That's all I know.

11 Q Let me ask you to turn to the tab of your binder
12 in front of you that's the deposition transcript and
13 direct you to page 274.

14 And, Dr. Putnam, do you recall giving the
15 deposition in this matter?

16 A Yes.

17 Q Do you recall that I was there and Mr. Dusseault
18 was present as well?

19 A Yes.

20 Q You swore an oath to tell the truth at that
21 deposition?

22 A That's right.

23 Q And you understood you were under an obligation
24 just as you would be in this courtroom to answer
25 truthfully; is that right?

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1 A Yes, I did.

2 Q Does this appear to be a transcript of that
3 deposition?

4 A Yes.

5 Q Now, if I could direct your attention specifically
6 to page 274, line 14, and ask that you follow along as
7 I read out loud.

8 As you sit her today, can you provide me one
9 specific feature or benefit of RSS that's unrelated to
10 the patented technology?

11 Answer: No, I think that's a statement about both
12 the scope of the patent and also the technical
13 features of and how that scope interacts with RSS.
14 And I wouldn't presume to do that.

15 Did I read that correctly?

16 MR. DUSSEAULT: Your Honor, I object. It's
17 improper impeachment. It's not directly inconsistent
18 with the testimony that was given.

19 THE COURT: Overruled. But, Mr. Strapp, you
20 said it's page 274?

21 MR. STRAPP: Your Honor, there's a tab.

22 THE COURT: How many depositions are there?

23 MR. STRAPP: There are a few. So in the
24 black binder that I handed up, I believe there are two
25 deposition transcripts, and I was referring to the

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1 first one that has a tab, deposition transcript of
2 Jonathan Putnam.

3 THE COURT: I was on the wrong one because it
4 sure didn't say what you said, but he was on the right
5 one.

6 MR. STRAPP: It was specifically page 274,
7 lines 14 through 20.

8 THE COURT: All right. And did you have a
9 question? He raised an objection and I overruled it.

10 MR. STRAPP: No. I'm moving on to my next
11 question.

12 Q You would agree, Dr. Putnam, that it would be
13 irresponsible for you to try to say what things are
14 combined in the patent that make it advantageous over
15 old ways of doing things? Let me withdraw that
16 question and move on.

17 I want to talk, Dr. Putnam, a little bit about
18 where you and Dr. Ugone agree. Now, you agree,
19 essentially, completely with Dr. Ugone's calculations
20 of Lawson's license and maintenance revenues; isn't
21 that correct?

22 MR. DUSSEAU: Objection, Your Honor.
23 Vague. We have established Dr. Putnam wasn't here
24 when Dr. Ugone testified. That was at their request.
25 And they objected repeatedly to any questions this

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1 morning about what Dr. Ugone said.

2 MR. STRAPP: Maybe, Your Honor, to short
3 circuit this, I could direct Dr. Putnam to the
4 demonstrative that was shown on his direct by which he
5 testified.

6 THE COURT: You're going to rephrase the
7 question? All right.

8 BY MR. STRAPP:

9 Q Could you, please, for the purpose of expediting
10 these questions, can you please put up defendant's
11 slide 702 on the screen? And the slide is entitled,
12 Calculation of revenue base. Do you see that?

13 A Yes.

14 Q And you have three different columns on the slide;
15 is that correct?

16 A That's right.

17 Q I just want to ask you with respect to each column
18 on the slide whether Dr. Ugone and you are in
19 agreement. Okay. Do you understand the question?

20 A I do.

21 Q Now, are you and Dr. Ugone in agreement regarding
22 the customers that you identified to calculate the
23 revenue base?

24 A Yes.

25 Q Are you and Dr. Ugone in agreement regarding the

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1 apportionment of licensing and maintenance revenue
2 that you calculated?

3 A There were two apportionments. I agree with Dr.
4 Ugone on both of them. I think both are mandatory.
5 He thinks one is optional, but other than that we
6 agree.

7 Q Do you agree with the way in which Dr. Ugone
8 calculated service revenues?

9 A Yes.

10 Q Now, if someone were to tell you to compute
11 Lawson's gross margins, you would end up with a very
12 similar number to what Dr. Ugone presents; isn't that
13 correct?

14 A Yes.

15 Q When you were calculating incremental profits, the
16 way you did that is you started with total revenue and
17 you subtracted the cost of goods, correct?

18 A To obtain gross profits?

19 Q That's correct.

20 A Yes.

21 Q That gave you a gross margin of somewhere around
22 65 percent; is that correct?

23 A That's right.

24 Q So you agree with Dr. Ugone in his original report
25 that the gross margin for the infringing

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1 configurations was approximately 65 percent, correct?

2 A In his original report?

3 Q Yes.

4 A I don't recall. The infringing configurations
5 were different then, but it wouldn't surprise me if
6 that were still the case.

7 Q You say that one reason a gross margin is
8 generally an incorrect measure of damages is because
9 it doesn't take into account non-manufacturing costs
10 that are associated with each sale; isn't that
11 correct?

12 MR. DUSSEAUT: Your Honor, vague and beyond
13 the scope as to you say that. I'm not sure whether
14 he's talking about testimony because I don't recall
15 that being said here. I guess I don't really
16 understand what he's referring to.

17 THE COURT: He objects to the form of the
18 question.

19 MR. STRAPP: I can rephrase.

20 THE COURT: Do it.

21 Q You assume sir, don't you, that one reason gross
22 margin is generally an incorrect measure of damages in
23 compensation is because it doesn't take into account
24 additional non-manufacturing costs that a firm incurs
25 to make the sale; isn't that correct?

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1 A Yes. We call them operating costs, that's right.

2 Q But, in fact, direct costs that are subtracted to
3 calculate gross profits are not limited to
4 manufacturing costs, are they?

5 A There are costs that are also subtracted directly
6 that are not considered part of the cost of goods
7 sold, that's true.

8 Q Those costs are subtracted to get to a gross
9 margin, correct?

10 A Not necessarily.

11 Q Well, are there direct costs that are subtracted
12 from revenue to arrive at a gross margin that do not
13 include manufacturing costs?

14 A For example, sales commissions. So yes.

15 Q You and Dr. Ugone, I think you testified,
16 estimated different incremental profit margins; is
17 that correct?

18 A I estimated it. He assumed it. That's right.

19 Q Now, leaving that characterization aside, you both
20 agree that incremental profit margins reflect the
21 additional costs that a firm must incur when making an
22 additional sale; is that right?

23 A Yes, in the short run.

24 Q Lawson does not compute an incremental profit
25 margin, does it?

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1 A No, it's an economic concept.

2 Q Indeed, that's not how Lawson thinks about its
3 business, right?

4 A In general, accountants don't compute incremental
5 margins at all, that's right.

6 Q So the incremental profit margin that you say is
7 the one we should use for determining incremental
8 profits associated with configurations 3 and 5 is one
9 that's your own construct, your own calculation; isn't
10 that correct?

11 A It's what economists do typically and I did the
12 typical thing, that's right.

13 Q Specifically, the way you did it was by computing
14 incremental profits using regression analysis, right?

15 A That's correct.

16 Q I think you testified that the data you used to
17 perform this regression was company-wide data; is that
18 correct?

19 A That's right.

20 Q And just to clarify, that underlying data, that's
21 not specific to configurations 3 and 5, correct?

22 A That's true.

23 Q Would you agree that insofar as you're trying to
24 accurately characterize what Lawson would have done
25 during the injunction period, you would probably be

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1 more interested in data that's closer in time to that
2 injunction period as opposed to data that's farther
3 back in time?

4 A Only if one had reason to believe that the
5 behavior was different further back in time, which I
6 don't.

7 THE COURT: If you're talking about profits,
8 isn't it more important in measuring profits to
9 measure it closer in time to the point at which a
10 court has to actually assess what was the profit?

11 THE WITNESS: That's a really good point,
12 Your Honor. And the answer is yes. And I did use,
13 for the purpose of the margin, the margins in 2012. I
14 did do that.

15 The regression analysis is asking a
16 behavioral question, which is: How does the firm
17 respond to a change in its revenues by varying its
18 costs? So that's not asking the total margin. It's
19 asking the change in the margin in response to a
20 change in revenue.

21 THE COURT: I think the question he's asking,
22 and I perhaps am interested in, is to what extent is a
23 regression analysis affected by changes in management
24 in the company, changes in economic conditions in a
25 year in which a data point is compiled, and at what

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1 point can you actually be comfortable that the
2 conditions over a 12-year period are replicated at
3 about the time the measurement needs to be made as
4 opposed to the beginning of the period where the data
5 set is accumulated?

6 THE WITNESS: It's an excellent question,
7 Your Honor, and we could do a whole master class on
8 the diagnostics of a regression, which I wouldn't want
9 to bore the Court with, but from an economic
10 perspective, the question is, is there any evidence
11 that the behavior of the firm changed at any point
12 during this period. One would look for evidence of
13 that change by saying that those -- instead of those
14 dots clustering along that line, that there were some
15 dots that appeared far off the line and seemed to be
16 different. They are called outliers. I didn't find
17 any outliers. So I had no reason to believe that the
18 behavior of the firm changed over time, particularly
19 with respect to a relatively small change in revenue
20 of about 3 percent.

21 Q Your regression analysis was based on SCC filings
22 and specifically 10-Q filings that Lawson made between
23 2000 through the third quarter of its fiscal year in
24 2011; is that correct?

25 A That's correct.

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1 Q Lawson's 10-Q for the third quarter of fiscal year
2 2011 went through the end of February 2011; is that
3 right?

4 A I think that's right.

5 Q The Court order that is alleged to be infringed,
6 the injunction order, that's dated May 23, 2011,
7 right?

8 A That's right.

9 Q Could we put up slide 703, defendant's slide 703,
10 please.

11 Mr. Dusseault asked you about this slide earlier
12 today. This has fiscal year 2011 and fiscal year 2012
13 profit and loss spreadsheets. Do you see that?

14 A Yes.

15 Q And you understand that those were provided and
16 produced by Lawson in these proceedings?

17 A Yes.

18 Q Now, you issued a supplemental report in this
19 matter on March 8, 2013; isn't that correct?

20 A Yes.

21 Q Now, in that supplemental report, you didn't
22 update or calculate a new regression to take into
23 account this 2012 data, did you?

24 A Yes. They were reported differently. They
25 weren't reported in a comparable format. So I could

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1 not simply add them to the prior data.

2 THE COURT: The answer is no, you didn't.

3 THE WITNESS: You're right, Your Honor. I
4 didn't do it because one could not do it. That's
5 right.

6 Q You say you could not update your old regression
7 because the old regression was worldwide data that was
8 publicly reported and this data is limited to the U.S,
9 correct?

10 A That's right.

11 Q But you also didn't create a new regression based
12 on this 2012 and 2011 profit and loss data for the
13 Americas, did you?

14 A There are only eight observations that would be
15 less reliable.

16 THE COURT: The answer, though, is that you
17 didn't.

18 THE WITNESS: I did not do that, that's true.
19 You're right.

20 Q You could have done that and then compared that
21 new regression with new data against the old data that
22 you used in your first regression and you didn't do
23 that either, right?

24 A I could have done that. I didn't think it would
25 be reliable given the few observations, but in any

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1 event, I did not could it, that's right.

2 Q You didn't think it would be reliable to look at
3 the most recent data and calculate a new regression;
4 that's your testimony?

5 A Regressions depend on having a certain amount
6 of data.

7 THE COURT: He asked you -- that's answerable
8 yes or no, Dr. Putnam.

9 THE WITNESS: I'm sorry, Your Honor. I did
10 not compute a regression for those two years, that's
11 right.

12 Q You said that this data you did use to --

13 THE COURT: I don't think that was the
14 question. I think his question was about the
15 reliability of doing that.

16 Ask your question again.

17 Q My question is: You didn't consider it reliable
18 to rely on new data from 2011 and 2012 and create a
19 regression and test that data versus your old
20 regression model?

21 THE COURT: Yes or no?

22 A I did not consider that procedure reliable, you're
23 right.

24 Q Now, the data you used for your old regression
25 model -- let me just rephrase that. The data you used

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1 for your only regression model, the 2000 to 2011 data,
2 that was data was worldwide Lawson revenue and cost
3 data; isn't that correct?

4 A Yes.

5 Q And that data was all from the time that Lawson
6 was a public company, correct?

7 A Yes.

8 Q Now, you understand that Lawson was taken private
9 in a transaction involving Infor in approximately the
10 second quarter of 2011, around April of 2011; do you
11 understand that?

12 A Yes.

13 Q You don't know how the company has been run since
14 it was taken private in that time period, do you?

15 A Well, I spoke with Mr. Samuelson, who is the CFO,
16 during that period. So to that extent, yes, I do.

17 Q Let me direct you back to your deposition, please,
18 sir, and ask you to turn to page 207.

19 THE COURT: Is that the first tab?

20 MR. STRAPP: That's the first tab.

21 Q Once you're there, I'll ask you to turn on 207 to
22 line 9, please.

23 A Okay.

24 Q Actually, let me start with line 3. Line 2, I'm
25 sorry. 207, line 2, and please follow along as I read

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1 aloud.

2 Question: When did that occur?

3 Answer: Well, Lawson was taken private in 2010, I
4 think, or, I mean, I should have --

5 Question: I think it was 2011.

6 Answer: I'm sorry, yes, it was, what, the second
7 quarter of 2011 or something. I forget the exact
8 date.

9 Question: So that effect wouldn't have shown up
10 in your data, would it have?

11 Answer: The effect of -- well, in other words,
12 let's assume that -- in other words, the only data I
13 have is for when Lawson was a public company. So I
14 don't know how the company has been run since it was
15 taken private because I don't observe that.

16 Do you see that?

17 A Yes.

18 Q Now, isn't it in fact true that you did have data
19 regarding how Lawson has been run since it was taken
20 private from the 2011 and 2012 profit and loss
21 statements that we just showed on the screen?

22 A That is certainly true. You have that financial
23 data. The question is how to marry it to the earlier
24 data to see if there's been a change.

25 Q You didn't attempt to marry that data by creating

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1 a new regression analysis, did you?

2 A Because the data themselves also are not
3 comparable, that's right.

4 Q Now, changing control or management of a business
5 can lead to differences in the willingness of
6 management to address and regulate expenses and costs;
7 isn't that correct?

8 A As a matter of principle, sure.

9 Q You mentioned that the 10-Q forms you looked at
10 contain Lawson's worldwide financial data; isn't that
11 correct?

12 A Yes.

13 Q You didn't include any information from those 10-Q
14 forms in your regression analysis that would be
15 limited to Lawson's U.S. revenues and cost data, did
16 you?

17 A I did not. I'm not sure that one could.

18 Q You don't cite any evidence or analysis in either
19 of your reports to suggest that Lawson worldwide data
20 is representative of Lawson U.S. data, do you?

21 A My understanding was it was representative, but I
22 didn't cite specific evidence to that to make that
23 point, that's true.

24 Q You didn't cite any basis for your opinion that
25 worldwide data is representative of the U.S. data, did

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1 you? Yes or no?

2 A I did not cite any such evidence.

3 Q Okay. Now, the regression analysis that you
4 calculated applied results of worldwide data to a cost
5 and revenue analysis for just the U.S. data; isn't
6 that correct?

7 A If you mean that the patent affected revenues in
8 the U.S. and therefore the loss would have been to the
9 U.S. unit of Lawson, then that's true. It would have
10 been dealt with on a global basis, but sure.

11 Q You said that you used the word "regression
12 analysis" --

13 THE COURT: I guess part of what I'm
14 interested in is wouldn't the validity of the
15 underlying figure, such as labor costs, for example,
16 be significantly affected and wouldn't the average be
17 dropped down if they are paying Philippine labor
18 charges versus Minnesota labor charges?

19 THE WITNESS: That's a very good question,
20 Your Honor, but the ultimate question we're interested
21 in is not trying to explain all the reasons why Lawson
22 spent the money that it spent. The question is: How
23 did Lawson respond to a change in its revenues as
24 reflected in the change in its costs?

25 THE COURT: I understand that, but my

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1 question was different than that. And that is:
2 Doesn't it make a difference where the costs are
3 incurred in determining what is the quantum and
4 whether or not they'd be willing to take action in
5 respect of those costs?

6 THE WITNESS: Well --

7 THE COURT: And the answer has got to be yes
8 or no on that one.

9 THE WITNESS: It's a compound question, Your
10 Honor, with all respect.

11 THE COURT: It is.

12 THE WITNESS: So the answer is the
13 location -- the location certainly does make a
14 difference as to the total level of costs, but as to
15 the second part, whether it makes a difference in
16 their willingness to take action, I'm not aware of any
17 differential in their willingness to take action in
18 response to a change in revenue occurring in the U.S.
19 versus some other place. They're still trying to
20 maximum profits regardless of where those profits are
21 being earned.

22 THE COURT: Well, then why do they outsource
23 that? Why do they get places -- it looks to me like,
24 from what Mr. Samuelson said, the first place that
25 they would cut is Minnesota, not the Philippines.

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1 That would increase your margin, wouldn't it, if
2 you're cutting costs?

3 THE WITNESS: In Minnesota?

4 THE COURT: Yes. If you cut the higher paid
5 employees and keep the lower paid, your margin is
6 going to be increase, isn't it?

7 THE WITNESS: That certainly is true.

8 THE COURT: This just goes to the reliability
9 of the use of that data, I think, is his question.

10 Is that right?

11 MR. STRAPP: That's right, Your Honor.

12 THE COURT: I see.

13 MR. STRAPP: Since Your Honor asked about the
14 Philippines, I want to hand up Lawson's 10-K.

15 THE COURT: That'll teach me.

16 BY MR. STRAPP:

17 Q Now, you reviewed Lawson's 10-K from fiscal year
18 2010, didn't you?

19 A I believe so, yes.

20 MR. STRAPP: Can we put up the 10-K on the
21 screen, please? If I could direct Your Honor's
22 attention specifically to page 46 of the 10-K.

23 Q Once we're all there, I would ask you to turn, Dr.
24 Putnam, to the section on research and development.
25 Do you see that?

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1 A Yes.

2 Q And, specifically, to the second paragraph in that
3 section. Are you with me?

4 A Yes.

5 Q Do you see that it states "Research and
6 development expenses for fiscal 2010 increased 7.9
7 million or 9.6 percent compared to fiscal 2009. This
8 increase was primarily due to a net increase in
9 employee related costs of 5.5 million related to an
10 increase in incentive compensation as well as an
11 increase in our offshore capacity in Manila, you see
12 that?

13 A Yes.

14 Q You did not mention this explanation that Lawson
15 gave in its public 10-K as the primary reason for
16 increase in its R&D expenses in either of your
17 reports, did you?

18 A No, but it's not a general explanation. It's
19 something that happened in a particular quarter in
20 response to particular events in a particular place.
21 So one would not mention this in a regression
22 analysis. This is typical of the kinds of things that
23 vary from quarter to quarter and place to place that
24 the regression doesn't capture and isn't intended to
25 capture.

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1 Q If I could direct your attention also to the sales
2 and marketing section here on the same page, the
3 second paragraph. Do you see that it states, "For the
4 fiscal 2010 sales and marketing expenses decreased
5 0.7 million or 0.4 percent compared to the similar
6 period in fiscal 2009. The decrease was primarily the
7 result of a \$1.8 million decrease in marketing
8 programs costs, a \$1 million decrease in professional
9 fees, a .6 million dollar decrease in third party
10 costs, and a .5 million dollar decrease in employee
11 related costs due to lower head count and lower travel
12 expenses.

13 Did I read that correctly?

14 A Yes.

15 Q Now, you did not mention this explanation that
16 Lawson gave as its primary reason for decreases in
17 sales and marketing expenses in either of your
18 reports, did you?

19 A Because these aren't economic variables. These
20 are particular effects that happened --

21 Q I asked you whether or not you included it in your
22 reports; just yes or no?

23 A I did not include the fiscal's 2010 explanation of
24 changes in sales and marketing expenses in my report,
25 that's true.

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1 Q Isn't it correct, sir, that when Lawson is
2 describing the primary reasons for changes in costs
3 for research and development and sales and marketing
4 in its 10-K, it mentions nowhere that there was an
5 increase or decrease in revenues that drove
6 corresponding costs for research and development and
7 sales and marketing; isn't that correct?

8 A Well, but that's because -- the answer is they
9 don't relate it to revenues, at least in these
10 paragraphs.

11 Q Maybe turn to the next page, page 47, please.
12 The second paragraph here under the general and
13 administrative section. Are you there?

14 A Yes.

15 Q Do you see it states, General administrative
16 expenses increased \$4.5 million or 5.7 percent in
17 fiscal 2010 compared to fiscal 2009? The increase was
18 primarily the result of \$4.4 million related to
19 adjustments recorded to our pre-merger litigation
20 reserve recorded in fiscal 2009 without comparable
21 adjustments in fiscal in 2010.

22 Did I read that correctly?

23 A Yes.

24 Q There's no mention that the general and
25 administrative expenses increased because of some

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1 increase in revenue, is there?

2 A Of course not, no.

3 Q Put that aside. In general, you would agree with
4 me that a regression analysis is a technique for
5 determining the relationship between a dependent
6 variable that you want to explain and one or more
7 independent explanatory variables, correct?

8 A Yes.

9 Q In performing your regression, the only
10 explanatory variables you used to explain Lawson's
11 expenses were a constant term and Lawson's revenues,
12 correct?

13 A That's right.

14 Q Let's turn to figure 5 from your report. It's
15 also DX 673.

16 MR. STRAPP: And if I could ask Your Honor to
17 turn -- it's in the binder towards the back. There's
18 a tab DX 673. I'll also put it up on the screen.

19 MR. DUSSEAUT: Your Honor, if it would help,
20 we have no objection to moving this into evidence.

21 MR. STRAPP: I'm not going to move it into
22 evidence.

23 THE COURT: All right.

24 Q Figure 5 of your report here, which is -- it's
25 been marked as DX 673. This shows data points in a

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1 regression line for sales and marketing costs,
2 correct?

3 A Yes, this is identical to the graph that we saw
4 earlier, that's right.

5 Q That was one of the slides that was put up during
6 your direct examination?

7 A That's right.

8 Q That was the slide that had all those dots on it
9 and a line?

10 A Yes, that's right.

11 THE COURT: The one that was put up that
12 calculated the -- it had the slope calculation in it,
13 I believe.

14 THE WITNESS: That's right, Your Honor.

15 Q Now, you also gathered data points and calculated
16 regressions for general and administrative costs and
17 for research and development costs, correct?

18 A Yes.

19 Q But you didn't actually include the graphs that
20 showed the data points and regression line for your
21 general and administrative regression or your research
22 and development regression in either of your reports,
23 did you?

24 A That's right. They are very similar.

25 Q You testified that the reason you didn't is

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1 because, as you just said, they are very similar,
2 correct?

3 A Yes.

4 Q Actually, isn't it true that the graphs, the
5 regression graphs for research and development, and
6 the regression graph for general and administrative
7 expenses would have different slopes from the graph
8 shown here at DX 673?

9 A Of course. Because as revenues rise, the
10 expenditures on those cost categories rise at
11 different rates.

12 Q You just said they very similar. Are they very
13 similar or are they not very similar?

14 A They're very similar. They have lines that have
15 different slopes by definition, but, in other words,
16 to the Court or to an untrained observer, they would
17 look like a line through a bunch of dots. That's the
18 only point that I was trying to make, not that the
19 slopes were identical.

20 Q But you said they are very similar, correct?

21 A And they are very similar, that's right.

22 Q I'd like for you to turn in your deposition,
23 please, sir, to page 181. That is the first
24 deposition tab. In particular, once you get to 181,
25 focus on line 22. I'm going to read from 181, line

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1 22. Please follow along, sir as I read aloud.

2 Question: Is the slope of the line that you would
3 draw if you were graphing the R&D regression results,
4 would it be the same slope as the sales and marketing
5 line?

6 Answer: No, it would be about half the slope.

7 Question: So it wouldn't be the same?

8 Answer: Well, that is certainly true. And I
9 don't mean to suggest that the coefficient is the
10 same. What I mean to suggest is that, well, in other
11 words, it is what it is. They would have different
12 slopes.

13 Did I read that correctly?

14 A Yes.

15 MR. DUSSEAUT: Your Honor, I would object
16 because that's obviously not properly impeachment.
17 That's pretty much what Dr. Putnam said today.

18 MR. STRAPP: Your Honor, I think that there's
19 a large difference between very similar slopes and
20 slopes that are halfway different from each other.

21 MR. DUSSEAUT: Your Honor, Mr. Strapp is
22 mischaracterizing what he said. He's taking the very
23 similar from one statement and Dr. Putnam's testimony
24 that the slopes would be different, and he's combining
25 them together.

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1 THE COURT: Overruled.

2 Q Let's look at the one graph you actually did
3 include in your reports, the sales and marketing data
4 graph. And that, I think, is -- we had it up on the
5 screen. It's DX 673. So I want to turn back to that.
6 Are you there, sir?

7 A Yes.

8 Q Now, in the data that you looked at and for this
9 regression analysis, sometimes the revenue that Lawson
10 received in one quarter was approximately the same as
11 the amount it received in another quarter, correct?

12 A Yes.

13 Q For example, if you look closely on the screen
14 here, do you see just on the X axis that it's plotted
15 quarterly revenues. Do you see where I am?

16 A Yes.

17 Q And you added 000, right, to figure out what those
18 revenues are in actual dollar figures?

19 A Yes, that's right.

20 Q So if we looked right next to the \$100 million on
21 a quarter revenue X axis line, do you see that?

22 A The \$100 million figure, yes.

23 Q Yes. Just before you get to the \$100 million
24 figure, if you go upwards and look up on this graph,
25 you'll see there's a cluster of data points that is

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1 right around the \$100 million or maybe the \$90 million
2 figure. Do you see that?

3 A Yes.

4 Q Now, if we look at the Y axis of this graph,
5 that's plotting sales and marketing expenses, correct?

6 A Yes.

7 Q That's also you add a 000 there to figure out what
8 the actual sales and marketing expenses are in dollar
9 figures, correct?

10 A Yes.

11 Q Now, if we just focus on this cluster of data
12 points I'm referring you to right around the \$90
13 million revenue figure, just focus on that for a
14 minute. Do you see that the sales and marketing
15 expenses in that cluster of data points, it ranges
16 from about 15 or \$16 million in sales and marketing
17 expenses all the way up to about \$32 million in sales
18 and marketing expenses; is that correct?

19 A Yes.

20 Q Now, isn't it true there can be several different
21 factors and several different reasons why sales and
22 marketing expenses could widely vary in a particular
23 quarter even if the revenues are roughly the same? Is
24 that true?

25 A True.

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1 Q In fact, there are probably a thousand reasons,
2 right?

3 A It's a large company with people making thousands
4 of decisions in every quarter, that's true. Of
5 course.

6 Q You didn't actually investigate any of those
7 reason when you calculated Lawson's incremental profit
8 margin, did you?

9 A Well, I don't think that's exactly true. I
10 certainly spoke with Mr. Samuelson about
11 representative reasons, but it's a complicated company
12 making complicated decisions. Many complicated
13 decisions.

14 Q So the answer is you didn't investigate the
15 reasons why sales and marketing, R&D, and G&A expenses
16 can widely vary in a particular quarter even if
17 revenues are roughly the same, did you?

18 A The answer is no, that's not true. I spoke with
19 Mr. Samuelson about it.

20 THE COURT: Or the answer is yes, it is true
21 except as I said, I spoke with Mr. Samuelson about it.
22 One way or the other. But in either way, he spoke to
23 Mr. Samuelson about it.

24 Q Did you speak to Mr. Samuelson about specifically
25 why quarterly sales and marketing expenses can vary

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1 from 16 million to 32 million in a quarter when
2 revenues are roughly the same? Did you ask him that
3 question?

4 A Not knowing that you would ask me today, no, I
5 didn't.

6 Q Now, let's turn to DX 659. Let's put that up on
7 the screen. Sir, these are some of your regression
8 results, right?

9 A Yes.

10 Q So once you did the regression, you applied the
11 coefficients you have generated to Lawson's total
12 revenues, and you used your regression results to
13 classify some portion of Lawson's sales and marketing,
14 general and administrative and research and
15 development costs as variable costs, correct?

16 A That's right.

17 Q What we're looking at here, if you go to line E,
18 do you see there's a line variable general and
19 administrative costs?

20 A Yes.

21 Q And you see there's a column heading "fiscal year
22 2011"?

23 A Yes.

24 Q So it's your calculation then using your
25 regression model that the variable general and

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1 administrative costs incurred by Lawson in 2011 were
2 \$64,380,034; is that correct?

3 A That's the implication of the regression, yes.

4 MR. STRAPP: Can we put up DX 656, please.
5 Could I ask everyone to turn in their binders, please,
6 to DX 656.

7 Q Dr. Putnam, let me know when you're there.

8 A I have it on the screen.

9 Q Do you see that this is an income statement from
10 Lawson for fiscal year 2011?

11 A Yes.

12 Q I want to direct your attention to the column on
13 the right, which is total, and the line T, which is
14 general and administrative, and tell me when you're
15 there.

16 A I see it.

17 Q If you look at the total G&A expenses for fiscal
18 year 2011, do you see that they're reported by Lawson
19 at 68,113,139?

20 A Yes.

21 Q So in fiscal year 2011, you classified about 64
22 million of Lawson's total 68 million general and
23 administrative costs as variable; is that roughly
24 accurate?

25 A That's what the regression would predict for that

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1 particular data point, that's right.

2 Q That's over 90 percent of Lawson's general and
3 administrative costs you're classifying as variable
4 based on your regression results, correct?

5 A That's right.

6 Q You reviewed and actually you said you relied on
7 the deposition testimony of Kevin Samuelson in forming
8 your opinion, correct?

9 A Yes, I did.

10 Q So you must be aware, sir, that Mr. Samuelson
11 testified that most general and administrative costs
12 are probably fixed costs, aren't you?

13 A When he used the word "fixed," he had a particular
14 meaning, but he did say that, that's right.

15 Q If you're classifying G&A as over 90 percent
16 variable, that's inconsistent with Mr. Samuelson's
17 testimony, isn't it?

18 A Actually, taking his testimony as a whole, it's
19 quite consistent. In the long run, all of these costs
20 are variable. So one would expect them all to be
21 variable finding that over 90 percent over a year is
22 variable is completely consistent.

23 Q You understand that Mr. Samuelson's testimony, he
24 didn't characterize "fixed cost" the way that you do
25 with long run or short run. He just said that most

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1 G&A costs for Lawson are probably fixed. Isn't that
2 correct?

3 A I think you're actually mischaracterizing his
4 testimony. And he did explicitly say that what
5 mattered was the horizon over which one made the
6 decision.

7 Q I'll ask you to turn to a second deposition tab in
8 your binder. You'll see that there's deposition
9 transcript of Kevin Samuelson. And I want to direct
10 your attention, once you're there, to page 319 of that
11 transcript of Kevin Samuelson, the CFO at the time of
12 Infor.

13 THE COURT: What page?

14 MR. STRAPP: Page 319 of Kevin Samuelson's
15 deposition. That's the second deposition tab.

16 A Yes, I see it.

17 Q Once you're at page 319, please turn to line 12
18 and follow along, sir, as I read aloud.

19 Actually, let's play the video here. I want to
20 play the video of this portion of his transcript.

21 Go ahead.

22 (A video clip is played.)

23 Q When you were doing your regression analysis, sir,
24 you didn't ever ask Lawson to provide you with any of
25 the line items that roll up under the cost categories

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1 set forth on the P&L statement DX 656, did you?

2 A I didn't think it was necessary and I didn't,
3 that's right.

4 Q In fact, you didn't think that information
5 regarding the line items and the components of the
6 cost categories set forth in the P&L statement were
7 relevant in any way to the analysis that you did to
8 calculate Lawson's profit margin, did you?

9 A That's right. They're not relate. One can't do
10 regression by line items.

11 Q Well, as a factual matter, sir, isn't it correct
12 that you're not even sure exactly how Lawson allocates
13 and tracks its costs?

14 A I don't understand that question.

15 Q As a factual matter, you are not sure exactly how
16 Lawson allocates and tracks its costs; isn't that
17 correct?

18 A Well, I understand it generally from speaking with
19 Mr. Samuelson and understanding how firms track costs.
20 I'm sure they have internal procedures that are
21 specific to the company that I don't know about.

22 Q I'm not sure I understood your answer. Let me
23 just ask it again.

24 As a factual matter, you're not sure exactly how
25 Lawson allocates and tracks its costs, are you?

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1 A Okay. I'm not trying to be hard to live with,
2 Mr. Strapp, but I'm sure they do things that I don't
3 fully know for their own reasons. In general, I
4 understand their cost procedures and how they allocate
5 costs from speaking with Mr. Samuelson and from my
6 general knowledge of how firms track costs,
7 particularly software firms. So I know generally, but
8 there are things that I don't know. I would certainly
9 concede that.

10 Q Isn't it true that you didn't even pose the
11 question to Mr. Samuelson of how Lawson allocates and
12 tracks its costs?

13 A Because Mr. Samuelson's answer to that question
14 couldn't help me, so yes, that's right.

15 Q I want to turn to DX 725. You'll see that in your
16 binder. This also was an exhibit to your expert
17 report.

18 MR. STRAPP: But if everyone looks at the
19 back of the binder, almost at the very end, DX 725.

20 A Okay.

21 Q Now, this appears to be based on the fiscal year
22 2011 and 2012 profit and loss statements produced by
23 Lawson; isn't that correct?

24 A Yes.

25 Q I want to ask you about some of the figures here.

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1 This is fine print. So let's try to focus here on --

2 THE COURT: We're going to have to do it
3 without regard to the monitor. Can you read that?

4 MR. STRAPP: I think that we'll be able to
5 blow it up once I direct us where to go.

6 THE COURT: But can you read it the way it is
7 now?

8 THE WITNESS: I'm fine, Your Honor. I have
9 it in my binder. I'm good.

10 THE COURT: But I'm asking you a different
11 question. I'm testing my own vision.

12 THE WITNESS: Your Honor, actually, I can
13 read those numbers, yes.

14 THE COURT: You can? Okay.

15 Q Let's focus on the line R in the first instance.
16 Tell me when you're there.

17 THE COURT: Is that sales?

18 MR. STRAPP: Yes.

19 Q Do you see that that says "sales"?

20 A Yes.

21 Q And this is under a subheading -- if you see in
22 between L & M, there's a subheading operating
23 expenses. Do you see that?

24 A Yes.

25 Q So these are the sales operating expenses. Is

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1 that consistent with your understanding?

2 A Yes.

3 Q Now, if you look over to the 2012 column, it's the
4 second from the right, the total 2012 column. Do you
5 see that?

6 A Yes.

7 Q So total sales operating expenses for 2012 are
8 reported at \$60,786,448. Do you see that?

9 A Yes.

10 Q Just for the sake of making this a little bit
11 easier, I'm going to call that --

12 THE COURT: Wait a minute. Where?

13 MR. STRAPP: Sales operating expenses.

14 THE COURT: You're talking about R? Line R?

15 MR. STRAPP: Line R. and column total 2012.

16 THE COURT: 60 million.

17 MR. STRAPP: 60.8 million.

18 THE COURT: Yeah.

19 Q All right. On the line right below that, which is
20 line S, those are marketing and product management
21 operating expenses. Do you see that?

22 A Yes.

23 Q For 2012, those are reported at 16.8 million, do
24 you see that?

25 A Yes.

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1 Q So is it fair to say that the total sales and
2 marketing operating expenses for 2012 were about
3 77.6 million?

4 A Yes.

5 Q Could we turn to DX 728? Now, DX 728 is also an
6 exhibit to your report, and this is your calculation
7 of Lawson's incremental profit based on your
8 regression results, correct?

9 A Yes.

10 Q And you have here your predictions for what your
11 regression results would predict for various
12 categories of costs for fiscal year 2012, correct?

13 A Yes.

14 Q I want to just test your prediction with respect
15 to sales and marketing against the actual data, which
16 we have. Okay? So let's look at your prediction on
17 row D for variable sales and marketing expenses. Do
18 you see where I am?

19 A Yes.

20 Q Do you see that your regression result predicts
21 that in fiscal year 2012 there will be \$90.4 million
22 of variable sales and marketing expenses?

23 A Yes.

24 Q So what you're saying here -- what your regression
25 model predicts is that there are higher variable sales

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1 and marketing costs in 2012 than there were actual
2 total sales and marketing expenses that year; isn't
3 that correct?

4 A That's what it says, that's right. For a
5 particular year, that's true.

6 Q In fact, they were almost -- your prediction with
7 respect to variable sales and marketing expenses was
8 almost \$13 million higher than the total sales and
9 marketing expenses in 2012; isn't that correct?

10 A Sure.

11 Q Now, I think that if we could just turn to
12 Defendant's Slide 705. Okay.

13 This is a slide that Mr. Dusseault asked you about
14 on your direct. And if you look at the title of the
15 slide, what you say under your regression model is
16 when revenues increase, costs increase, correct?

17 A Yes.

18 Q You also say that under your regression model,
19 when revenues decrease, costs decrease; isn't that
20 correct?

21 A That has to be true, yes, that's right.

22 Q So your regression model would predict that when
23 revenues go up, general and administrative costs
24 should go up also, right?

25 A That's right.

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1 Q And your regression model would predict that when
2 revenues go down, general and administrative costs
3 should go down, correct?

4 A That's right.

5 Q Okay. All right. Let's take a look and see what
6 actually happened during the injunction period. And I
7 want to direct your attention back to DX 725, please.

8 DX 725, I think you testified, sir, is based on
9 Lawson's profit and loss statements for 2011 and 2012,
10 correct?

11 A That's right.

12 Q All right. So let's start by looking at revenue.
13 Can we look at quarter 4, 2011, total revenue. So
14 that's line E. Line E is total revenue. And then go
15 over to the fourth column, quarter 4, 2011. Do you
16 see the total revenue reported there is 126.3 million?

17 A Yes.

18 Q Now, move over one quarter to quarter 1, 2012.
19 The total revenue that Lawson reports here, and the
20 profit and loss statement for quarter 1, 2012 is
21 121.5 million. Do you see that?

22 A Yes.

23 Q So it's fair to say then from the fourth quarter
24 of 2011 to the first quarter of 2012 revenues
25 decreased by over \$4 million, right?

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1 A Yes.

2 Q That means that your regression results would
3 predict a corresponding decrease in general and
4 administrative costs, correct?

5 A Yes.

6 Q Let's look and see what actually happened. Can
7 you look at the fourth quarter of 2011 again? This
8 time I want you to move down to line T, general and
9 administrative. Tell me when you're there.

10 A I have it.

11 Q Quarter 4, 2011, general and administrative costs
12 are 20.3 million. Do you see that?

13 A Yes.

14 Q If we go over one quarter, first quarter of 2012
15 and look at general and administrative costs, do you
16 see that it says about 48.6 million, right?

17 A Yes.

18 Q So isn't it true that in this time frame in which
19 your model would predict G&A and costs decreasing, the
20 G&A costs actually more than doubled; isn't that
21 correct?

22 A If you're going to pick a quarter in isolation,
23 that's certainly is true, and it's certainly possible.

24 Q It's not just possible, it's true, right?

25 A That's what actually happened, yes.

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1 MR. STRAPP: Can we put slide 707 up on the
2 screen.

3 Q This is a slide, Dr. Putnam, you'll see on the
4 screen that you prepared regarding net profit, right?

5 A Yes.

6 Q You say on this slide that net profit subtracts
7 cost of goods sold, variable sales and marketing,
8 variable R&D/G&A and short run fixed costs, right?

9 A Yes.

10 Q Isn't it true, sir, that net profits are what's
11 left when you subtract all costs of doing business
12 from revenue, not just short run fixed costs and these
13 other costs you have listed here?

14 A Well, it depends on the precision of the
15 accounting definition. I've used a measure called
16 earnings before interest, taxes, depreciation and
17 amortization. So there are various other costs that
18 are actually not taken into account that are not
19 operating costs. And if you want to call those costs,
20 it should be accounted for in the net profit. Then
21 you could. Had you done that, Lawson's margin would
22 be lower and ePlus's damages would be less.

23 Q Isn't it your opinion, sir, that net profit
24 margins take account of all costs that firms incur to
25 make sales?

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1 A All operating costs. So in other words, if you
2 want the net operating margin, you need to look at the
3 operating costs. This doesn't take into account
4 operating costs.

5 Q I want to direct you to your report, sir. It's
6 expert report of Jonathan D. Putnam. Your first
7 report. It's a tab in your binder. And I want to
8 specially ask you to turn to page 44 in your report,
9 sir. Let me know when you're there.

10 A Okay.

11 Q Once you're at page 44 of your expert report, I
12 want to ask you to turn to paragraph 82.

13 A I have it.

14 Q Now, do you see in paragraph 82, you say, I
15 understand that the law supports the use of net profit
16 margins when evaluating an infringer's profits in the
17 context of a contempt award. In general, this is
18 appropriate because net profit margins take account of
19 all costs that firms incur to make sales. Do you see
20 that statement?

21 A Yes, that's right.

22 Q Now, you used Lawson's company-wide net profit
23 margin, not a net profit margin specific to
24 configurations 3 and 5, when you calculated net
25 profits for these proceedings, correct?

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1 A Those don't exist, but yes, that's right.

2 Q So yes, it's right that you used company-wide net
3 profit margin?

4 A Yes.

5 Q And the company-wide net profit margin is
6 calculated by deducting 100 percent of Lawson's
7 operating expenses from its revenue, right?

8 A Yes.

9 Q And net profits also take into account fixed
10 costs, correct?

11 A That's true.

12 Q It's your opinion, sir, that costs are fixed if
13 they do not vary directly with the number of sales
14 that a company makes, right?

15 A Depending on the meaning of "directly," yes.

16 THE COURT: That sort of sounds like what's
17 the meaning of "is."

18 THE WITNESS: I appreciate that, Your Honor.
19 Do you want me to clarify or not?

20 THE COURT: Yes. I want to understand what
21 you're talking about.

22 THE WITNESS: Okay. There are costs that
23 vary directly in the sense that they are
24 self-executing. So if a salesperson has a contract
25 with the company that says "if you make an additional

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1 sale, you will be paid 5 percent of that sale as a
2 commission," then that is varying directly and at the
3 moment that the sale is made.

4 There are other types of costs that don't
5 vary directly in the same sense that are still being
6 managed. And so, for example, if you discover that
7 you're going to make more sales than you otherwise
8 thought you would, you say to the HR department, We're
9 going to have to hire more people in order to support
10 these sales in the service department. Those sales
11 vary directly, but not in a self-executing way with
12 the level of revenues.

13 THE COURT: Do you define "directly" to mean
14 those that vary with self-execution or not or both?

15 THE WITNESS: I would say that "directly"
16 means something more than self-executing. It means
17 something that is managed with one eye on revenues and
18 is correlated with revenues so that when revenues
19 increase, they tend to increase.

20 THE COURT: All right.

21 BY MR. STRAPP:

22 Q Sir, you have not seen evidence that Lawson had to
23 incur additional general and administrative costs
24 after the date of the injunction as a direct result of
25 continuing to license, maintain or service the

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1 infringing configurations, have you?

2 A They didn't add to their costs. They went on as
3 they were before as I understand it. So that's right.

4 Q So from a business perspective, it was business as
5 usual, right?

6 A I think that's a cavalier way of putting it, but
7 in other words, I'm not aware of any changes in their
8 cost structure related to the introduction of RQC.

9 Q So from a G&A or general and administrative
10 perspective, you would expect that Lawson's expenses
11 continued as they did prior to the injunction, right?

12 A Right, but that's not the question that we're
13 asking, right?

14 Q I'm asking you a new question. The new question
15 is: From a general and administrative perspective,
16 you would expect that Lawson's expenses continued
17 after the injunction as were prior to the injunction,
18 correct?

19 A That's my understanding, yes.

20 Q Now, you also haven't seen any evidence that
21 Lawson had to incur additional product development
22 costs after the date of the injunction as a direct
23 result of continuing to license, maintain or service
24 the infringing configurations, have you?

25 A Maybe I don't understand the premise of the

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1 question, Mr. Strapp. Isn't what we're asking is what
2 Lawson would have done if its revenues had gone down?

3 THE COURT: Wait a minute. Do you understand
4 the question, not the premise, but the question?

5 MR. STRAPP: Do you want me to ask the
6 question again?

7 THE COURT: Yes, ask the question. See if
8 you understand it. If you understood it, please
9 answer it.

10 Q You have not seen evidence, Dr. Putnam, that
11 Lawson had to incur additional product development
12 costs after the date of the injunction as a direct
13 result of continuing to license, maintain or service
14 the infringing configurations, have you?

15 A You mean in addition to the costs that they were
16 incurring before the injunction?

17 Q Correct.

18 A No, I'm not aware of any evidence like that.

19 Q And you have not seen any evidence that Lawson had
20 to incur additional sales and marketing costs after
21 the date of the injunction as a direct result of
22 continuing to license, maintain or service the
23 infringing configurations, have you?

24 A No. I'm struggling with what your question
25 actually means.

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1 THE COURT: It doesn't make any difference
2 what it means. If you understand it, answer it yes or
3 no. We'll wrestle with what it means legally later.

4 All right. Go ahead.

5 Q You testified that if this Court wants to disgorge
6 Lawson's profits, it should disgorge net profits,
7 right?

8 A Yes.

9 Q In your opinion about the reason net profits
10 should be disgorged instead of incremental profits is
11 that the decision horizon over which a firm is
12 responding to a permanent injunction is in effect
13 infinity, correct?

14 A Yes.

15 Q You know that, in fact, there is actually a date
16 certain on which the Court issued an injunction and
17 that that date is May 23, 2011, correct?

18 A Yes.

19 Q And you also assume that contempt will be found on
20 some fixed date in the future, correct?

21 A Yes.

22 Q And you also understand, don't you, sir, that the
23 patent at issue in this case will expire in 2017,
24 correct?

25 A Yes.

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1 Q So the injunction period is not infinite, is it?

2 A Not literally infinite, no. For economic
3 purposes, it's as close to infinity as one cares to
4 get.

5 MR. STRAPP: No further questions.

6 THE COURT: How much do you have?

7 MR. DUSSEAUT: I will anticipate about 20
8 minutes, Your Honor.

9 THE COURT: Why don't we take an hour for
10 lunch.

11 (Luncheon recess taken at 1:05 p.m.)
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1 THE CLERK: All right, Mr. Dusseault.

2 MR. DUSSEAULT: Thank you, Your Honor.

3

4 REDIRECT EXAMINATION

5 BY MR. DUSSEAULT:

6 Q Good afternoon, Dr. Putnam.

7 A Good afternoon.

8 Q Dr. Putnam, during Mr. Strapp's examination, Judge
9 Payne asked you a question about to what extent a
10 regression analysis is impacted by changes in the time
11 period, changes in management, factors like that; do you
12 recall that?

13 A Yes.

14 Q Have you considered, in coming to your opinions, the
15 impact of the change in time period, and particularly the
16 change in management to Infor on the accuracy of your
17 regression?

18 A Yes.

19 Q What have you determined the impact is, if any?

20 A I've a two-part answer I guess I would say. First of
21 all, a regression analysis is designed to --

22 MR. STRAPP: Your Honor, I'm going to object to
23 this question as calling for testimony that's not set
24 forth in Dr. Putnam's expert report.

25 MR. DUSSEAULT: Your Honor --

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1 THE COURT: It was set forth in response to a
2 question that I asked, I think. Now, that doesn't make it
3 admissible. If you had objected to it, I told you, I'd
4 sustain objections to my own questions. It's all right to
5 do that, but if -- now he's objecting to it, Mr.
6 Dusseault.

7 MR. DUSSEAULT: Well, Your Honor --

8 THE COURT: So how do we deal with it? He's
9 saying that it was an improper question, area of inquiry.

10 MR. DUSSEAULT: I hate to say Your Honor has
11 opened the door, but I think it's open here, Your Honor,
12 and I want to just -- just a couple follow-ups.

13 THE COURT: Overruled.

14 Q Go ahead.

15 A So I think the question is, did I consider the effect
16 of changes in time period and changes in control in my
17 regression analysis, and the answer is, in general, yes.
18 The regression analysis takes into account things that
19 vary over time provided that they are not systematic.

20 So we saw some examples from Lawson's 2010 10K that
21 were individual examples of changes in expenditures that
22 did not recur and that were not systematic.

23 As to the specific question of how Lawson's
24 expenditures changed after the acquisition and it went
25 private, the real question is, was Lawson more likely to

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1 be sensitive to costs or less likely, or, in other words,
2 is the estimate that I made of the share of sales and how
3 they adjusted -- or the -- the costs and how they adjusted
4 to changes in sales, is that likely to be understated or
5 overstated.

6 My understanding from speaking with Mr. Samuelson is
7 that, if anything, Lawson became more sensitive to costs
8 after the acquisition which means that -- in fact, that
9 might have even motivated the acquisition --

10 THE COURT: I wasn't asking about that. My
11 question went to the extent to which changes over time
12 backwards, from the beginning, not changes after the time
13 but changes from the beginning of the analytical period
14 had an impact, if any, on the reliability of the
15 regression analysis, and you answered that.

16 THE WITNESS: Yes.

17 THE COURT: I've already got an answer for that.

18 Q Is Infor a private equity firm, if you know?

19 A Yes.

20 Q And do you have a view as to whether a private equity
21 firm is more or less likely than Lawson pre-acquisition to
22 reduce costs in order to maintain profit margins?

23 THE COURT: I think that's beyond, and sustained.

24 Q One point I wanted to clarify, Dr. Putnam, you were
25 talking about gross profits, and Mr. Strapp asked you a

1 question about sales commissions. Are sales commissions
2 part of the sales and marketing operating expense or part
3 of the gross profit?

4 A Typically they are classified as part of sales and
5 marketing expenses.

6 Q Now, Mr. Strapp asked you some questions about your
7 regression and particularly why you didn't create a new
8 regression with your second report to reflect data after
9 the acquisition and after Lawson went private; do you
10 recall that?

11 A Yes.

12 Q Why did you -- I want to take these in parts. Why did
13 you not create a separate regression analysis that
14 analyzed just that time period?

15 A Well, for that time period, we only have eight
16 observations. So you will recall when I put up the
17 regression result initially, I pointed to the fact that
18 there were 47 observations. When you have eight
19 observations, you've got a necessarily less reliable
20 regression.

21 I didn't think that it was -- would be reliable to try
22 to use so few observations for the 2011/2012 time period.
23 Also, I didn't marry the earlier data to the later data
24 because the earlier data were reported on a worldwide
25 basis, and the later data were reported on a U.S. basis.

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1 So one can't simply append them to each other and increase
2 the sample size that way.

3 Q Now, when you -- you've issued two reports in this
4 case; correct?

5 A Yes.

6 Q When did you first run a regression analysis?

7 A In the context of preparing my first report.

8 Q Did Dr. Ugone have a reply to that?

9 A Yes.

10 Q Did he run a regression analysis to correct any
11 supposed errors in the way you've done it?

12 MR. STRAPP: Objection; beyond the scope, and I
13 don't think there's any relevance here.

14 MR. DUSSEAULT: Your Honor, there's been
15 questions, a litany of questions about the reliability of
16 the regression analysis. I'm allowed to explore whether
17 he was -- whether their own expert ran a regression to try
18 to correct for these errors.

19 THE COURT: I think not. Objection sustained.
20 It's not relevant.

21 Q Mr. Strapp asked you some questions about Lawson's 10K
22 statements and particularly some particular descriptions
23 of factors that impact costs for a particular year; do you
24 recall that?

25 A Yes.

1 Q And Mr. Strapp asked you whether these particular
2 factors were something that you had incorporated into your
3 discussion; do you recall that?

4 A Yes.

5 Q Let me ask a threshold question. To the extent
6 there's a cost described in 2010 in the 10K or a 10Q, is
7 that cost part of what you looked in doing your regression
8 analysis?

9 A Of course.

10 Q So let me ask the second question which is, to the
11 extent you didn't incorporate the specific descriptions of
12 a factor that may have impacted a cost, why is it that you
13 didn't do that?

14 A In general, economists divide explanations into two
15 types. There are variables which affect the outcome or
16 the dependant variable in every period, and then there are
17 random or unexplained deviations that affect the outcome
18 in any particular period.

19 None of the categories of expenses that Mr. Strapp
20 identified constitutes an economic variable. They're all
21 properly classified as idiosyncratic effects that
22 affect -- that Lawson certainly spent the money, but it
23 was idiosyncratic particular to that particular period,
24 and there were expenses like that for every period.

25 What you are trying to do is to isolate the systematic

1 part of the expenses, which is the relationship to
2 revenues, from the idiosyncratic part which is expenses
3 that Lawson incurred for its own best reasons but may not
4 be related to revenues at all.

5 And it turns out that there's well-known diagnostic
6 tests for how to determine the relative importance of
7 those two things, and the systematic part, which is the
8 part that revenues explain is by far the most important
9 explanation for how Lawson costs changed.

10 As I explained, it accounts for between 85 and
11 89 percent of the total variation in costs. So Mr.
12 Strapp's idiosyncratic factors, while certainly present,
13 are idiosyncratic and de minimus.

14 Q Thank you for that, Dr. Putnam. There was another
15 point in the cross-examination where Mr. Strapp showed you
16 two exhibits, Defendant's Exhibit 725 and Defendant's
17 Exhibit 659, and he had you compare -- in one instance, he
18 said that the actual costs were lower than what the model
19 predicted for variable costs, and in another instance, he
20 said that the variable costs were very close to what the
21 model predicted?

22 A Yes.

23 Q One was involving sales and marketing, and the other
24 was involving G&A; do you recall that?

25 A Yes.

1 MR. STRAPP: Your Honor, I think that
2 mischaracterizes the testimony, because I only asked about
3 general and administrative, not sales and marketing on my
4 cross.

5 MR. DUSSEAULT: Let's look at 725.

6 THE COURT: Let's just ask the question and not
7 ask him what he remembers. Just ask him the questions you
8 want to ask him.

9 MR. DUSSEAULT: Let me get the exhibit, if I
10 could. I stand corrected. It is general and
11 administrative. Let me ask a different question then.

12 Q Does it concern you, in terms of the reliability of
13 your regression, that one can point to a particular
14 category of operating costs in a particular quarter and
15 find that the actual costs are either close to or even
16 higher than the predicted variable?

17 A Not at all.

18 Q Why not?

19 A Well, if you go back to the scatter plot, which is
20 Defendant's Exhibit 673 that we talked about, you'll see
21 that in every one of those data points, if you were to
22 look at it with a large enough magnifying glass, every one
23 of those data points differs from the regression line
24 itself which means that the regression line is incorrect
25 in the sense it doesn't get the actual data exactly for

1 any of the quarters in question.

2 About half the time, the situation is as Mr. Strapp
3 describes which is that the regression predicts more
4 expenditures than actually occurred. About half the time
5 the regression predicts lower expenditures than actually
6 occurred which is what you would expect of any average.
7 Half the time the actual data is below the average and
8 half the time it's above the average.

9 So it doesn't concern me at all that in the example
10 that Mr. Strapp pointed to, that prediction is not equal
11 to the outcome. If that were truly a critique, one
12 couldn't do data analysis at all, because one would be
13 held to a standard of invariably having to predict the
14 data exactly which can't be right. We're only trying to
15 predict the average relationship here, and we've done that
16 precisely.

17 Q Now, Dr. Putnam, do you recall when Mr. Strapp asked
18 you some questions about deposition testimony from Kevin
19 Samuelson?

20 A Yes.

21 Q Can we go to page 319, line 12 through line 19, of the
22 Samuelson deposition.

23 A I have it.

24 Q You have it, and you see this is the part that Mr.
25 Strapp went over with you where Mr. Samuelson makes a

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1 statement that most of the G&A would probably be fixed; do
2 you see that?

3 A Yes.

4 Q Now, I think you said when Mr. Strapp was asking you
5 about the Samuelson testimony, that you thought that the
6 testimony as a whole was consistent with your position.
7 What did you mean by that?

8 A Well, what I meant is that Mr. Strapp has simply taken
9 certain quotes without actually providing the context or
10 the follow-up questions, and if you were to continue to
11 read Mr. Samuelson's testimony, he goes on to talk about
12 how costs vary with revenues.

13 Q So let me post another question to you, if I could. I
14 want to read to you, starting at the line where Mr. Strapp
15 stopped, down to line 19 on page 320. So it says,
16 Question: And can you give me an example of a variable
17 cost, let's say, for example, under the sales line items.

18 Answer: Commission would be an example.

19 Question: Okay, a product development cost, let me
20 ask you whether the costs that are rolled up into the
21 product development line, the desegregated line items
22 under the general ledger for product development, are
23 those primarily fixed or variable costs?

24 Answer: Both.

25 Question: Both? And give me --

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1 Answer: And there's some -- by the way, there's some
2 gray area on where do people fit.

3 Question: Right.

4 Answer: Is that fixed or variable? And there are
5 very different opinions in software about where that
6 falls, and that's, obviously, the largest portion of our
7 cost structure, our people.

8 Question: Right.

9 Answer: So depending on how you perceive that,
10 obviously, to the extent we sold less product, we would
11 need less people. So at some level, it is variable.

12 Is that part of the testimony as a whole that you
13 considered in reaching your opinion, sir?

14 A Yes.

15 Q Now, Mr. Strapp asked you another question towards the
16 end of his cross, and he asked you whether you've seen any
17 evidence that Lawson had to incur additional expenses by
18 continuing to sell configurations three and five after the
19 injunction; do you recall that question?

20 A Yes.

21 Q Now, for purposes of calculating damages and applying
22 profit margins to a damage calculation, is that the right
23 question to be asking, whether Lawson incurred additional
24 expenses after the injunction as compared to before the
25 injunction?

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1 A No.

2 Q What is the right question to be asking, sir?

3 THE COURT: You mean from an economist's
4 standpoint.

5 MR. DUSSEAULT: Yes, sir.

6 THE COURT: May very well be the right question
7 from a legal standpoint.

8 Q Let me ask this: In terms of evaluating what costs
9 should be deducted, in your view as an economist, is that
10 the right question?

11 A No.

12 Q What would be the right question, sir?

13 A As I understand it, and in trying to carry out the
14 legal task, to compute damages, the question is a
15 counterfactual one, not an actual one.

16 In other words, what are the -- what would Lawson have
17 done had it complied with the injunction and not earned
18 the revenues that it, in fact, did. As part of asking
19 that question, one has to also ask, what costs would
20 Lawson have avoided or not incurred had it complied with
21 the injunction.

22 So rather than looking at the costs that it did incur
23 and whether they varied, which one would not expect, one
24 should ask the question, what costs would Lawson have
25 avoided, or, in other words, how much lower would its

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1 costs have been it had not taken in those revenues that
2 it, in fact, took in.

3 And that's what I've actually tried to measure with
4 the regression analysis. I've tried to answer that
5 hypothetical question, because what actually happened is
6 not -- we're measuring the difference between what
7 happened and what ought to have happened.

8 MR. DUSSEAULT: Thank you very much. I have
9 nothing further.

10 THE COURT: Can he be excused?

11 MR. STRAPP: Yes, Your Honor.

12 THE COURT: Thank you very much for being with
13 us, Dr. Putnam.

14 MR. DUSSEAULT: Your Honor, before Lawson rests
15 on remedies, the only housekeeping stuff we have is we
16 want to submit to Your Honor 30(b)(6) testimony from ePlus
17 relevant to remedies. It's the deposition testimony of
18 Mr. Farber, but it's a 30(b)(6) deposition testimony.

19 MR. STRAPP: Your Honor, I would just request
20 that the fairness designations and the objections that we
21 submitted be included as part of that package.

22 MR. DUSSEAULT: They are.

23 THE COURT: Are they included?

24 MR. DUSSEAULT: Yes, they are, Your Honor.

25 THE COURT: All right. Is that an exhibit? Is

1 that marked as an exhibit?

2 MR. DUSSEAULT: Your Honor, it's not marked as an
3 exhibit. This is deposition designations that were part
4 of the joint statement filed with the Court that we're now
5 submitting for the Court's consideration.

6 THE CLERK: I think the clerk's office will need
7 a copy to keep in the file. Okay, thank you.

8 THE COURT: Will you give these back to Mr.
9 Strapp.

10 MR. DUSSEAULT: Your Honor, the only other
11 housekeeping issue, there was one demonstrative that Your
12 Honor proposed that we mark as an exhibit and be deemed
13 admitted. Do you need the parties to do anything to
14 present that to you for the record?

15 THE COURT: I've got a copy of it. We'll need to
16 put it in the record, because it's not in your exhibits.

17 MR. DUSSEAULT: Do you want us to put that in the
18 record here?

19 THE COURT: Yes. Physically you have to put it
20 in the book. You've all got a bunch of these exhibits
21 that you've got up here -- I mean that I have up here, and
22 the clerk has a copy of them. You can just put it in
23 there and mark it as tab 578 or whatever it was.

24 MR. DUSSEAULT: Can we take care of that this
25 afternoon or tomorrow morning?

1 THE COURT: Any time. Any rebuttal?

2 MR. STRAPP: No, Your Honor.

3 THE COURT: All right.

4 MR. STRAPP: Your Honor, just one point before we
5 close the evidentiary record here. With respect to the
6 Hager deposition designations --

7 THE COURT: I have that question, too. Where do
8 we stand on Hager?

9 MR. STRAPP: I think as of today, we've resolved
10 the issues with counsel for Lawson, and we have an
11 agreed-upon list of designations that is slimmed down from
12 what we previously provided to you.

13 We don't yet have it ready physically to hand up
14 because the agreement was reached this morning, but we
15 think it should be prepared in short order.

16 THE COURT: Take this Hager binder and get -- and
17 then give me a new one.

18 MR. STRAPP: That's what we'll do, Your Honor.

19 MR. DUSSEAUT: Your Honor, one other
20 housekeeping matter. Your Honor's previous orders
21 specified post-trial briefing on colorability and
22 infringement and particular dates for each. It didn't say
23 anything specifically about briefing remedies, but I
24 personally --

25 THE COURT: It would be on the same schedule.

1 MR. STRAPP: Should we do that in a separate
2 brief, Your Honor?

3 THE COURT: I think what I want you to do is to
4 do it in a separate brief, because I believe that's what's
5 required for the colorability and infringement. Yes, it
6 is. And the remedies would be in a separate brief.

7 MR. STRAPP: We'll do that, Your Honor.

8 THE COURT: In the same order.

9 MR. DUSSEAULT: Yes, sir.

10 THE COURT: Now, I was to have the hearing on
11 April 30th, but I apparently have a criminal trial that is
12 not going to resolve itself on that date, and so rather
13 than do anything else about it, when is -- I'll hear the
14 argument on Friday, April 26, at 10:00 a.m. Anybody can't
15 do that? All right.

16 Your brief on the 23rd, briefs on the 23rd are
17 due by five o'clock. I'll deal with admission of the
18 exhibits in the 500 series after I finish doing some
19 further reading.

20 At one point in time, all of you sent me cases
21 that had been decided after *TiVo*. To your knowledge, have
22 I got all the cases decided after *TiVo* on contempt
23 hearings?

24 MR. STRAPP: I think, Your Honor, there have been
25 cases decided subsequent to the last submission, so we

1 could update that submission and include some additional
2 cases.

3 THE COURT: How about -- are there a lot of
4 people violating injunctions? Is that what's going on?

5 MR. STRAPP: It doesn't happen often, but it does
6 happen. So I think that there are at least -- at least I
7 know of one other published decision that we haven't yet
8 provided you.

9 THE COURT: What I want you to do is to sit down
10 and agree on the list of cases in which, after *TiVo*, a
11 court has considered the question of contempt, and I want
12 you to just give me the citations of those in a letter,
13 and I don't need any copies or argument or anything. I
14 just need the citations.

15 I want to make sure -- I think I've read
16 everything of which I am aware, but we haven't done any
17 updated research to find out if there's anything else at
18 this particular point.

19 We're now ready to hear the issue on the
20 injunction, Mr. Thomasch, having looked like he did not
21 take a red eye.

22 There are two things here. One is the Court of
23 Appeals gave a mandate to consider whatever it actually
24 said verbatim will be in the mandate, or any opinion, but
25 issued an opinion and instructed to consider what to do --

1 how to modify the injunction in light of the opinion.

2 Then Lawson filed a motion to dissolve the
3 injunction. Is that basically -- as I construe it, it was
4 your way of getting that issue on the table; is that
5 correct?

6 MR. THOMASCH: I think that is correct, Your
7 Honor.

8 THE COURT: All right. I just wanted to make
9 sure of that.

10 MR. THOMASCH: And, Your Honor, I do want to
11 start by thanking you. I was in court in California
12 yesterday and did arrive back at Dulles at 5:55 this
13 morning.

14 THE COURT: You did take a red eye.

15 MR. THOMASCH: I most certainly took the red eye
16 from Sacramento to Long Beach to Dulles and came from
17 Dulles to here but obviously could not have done the
18 argument sooner, and I appreciate the opportunity to be
19 able to make the argument to Your Honor.

20 It is a very important and fundamental argument,
21 and the jumping-off point, from our view here, is Your
22 Honor's order of March 12, 2013, docket number 1019.

23 One, Your Honor indicated in an order to the
24 parties that the Court, quote, remains of the view that it
25 is appropriate to reassess the propriety and scope of an

1 injunction as directed by the United States Court of
2 Appeals for the Federal Circuit in perspective of
3 additional briefing on the topic of the four factors that
4 must be considered in assessing the issuance of an
5 injunction as prescribed in *eBay® v. MercExchange, LLC*,
6 547 U.S. 388, 2006.

7 THE COURT: Mr. Thomasch, I will tell you that
8 after having done that, I have done considerable
9 additional reading, and I'm not sure that that's correct.
10 I may have erred in doing that, so I do want to hear the
11 arguments on the effect, *vel non*, of the mandate and the
12 decision as well as the four -- I'm still studying the
13 extent to which the four-factor test comes into play and
14 the propriety of considering it either separately or in
15 conjunction with a modification that would be -- whether
16 or not a modification could be consistently implemented as
17 required by the Federal Circuit while still considering
18 those factors. So I may have erred in that, but I don't
19 know.

20 MR. THOMASCH: Okay.

21 THE COURT: I just kept reading trying to do some
22 assessing, but all I say that for is so that all of you
23 will address both of the issues, and then I will have your
24 positions in mind when I am finishing the decisional
25 process.

1 MR. THOMASCH: I want to distinguish early out,
2 because I do think that whether we go out this from the
3 point of view of the mandate or the point of view of
4 Rule 60(b)(5), we effectively get to the same place, and
5 that is that our fundamental attack, first and foremost,
6 although there is an alternative argument, but our
7 fundamental attack is that this injunction needs to be
8 dissolved *ab initio*.

9 It is Rule 60(b)(5), of course, Your Honor, would
10 allow us to argue that certain facts -- let me withdraw
11 that. Let me see if I can rephrase that. It would allow
12 us to argue that even though the injunction on May 23rd,
13 2011, was properly granted, something has happened since
14 then by way of new facts that we could bring to the
15 Court's attention, and we would have a burden to show to
16 the Court that those new facts justify the Court in
17 amending or modifying or even dissolving the injunction on
18 a prospective basis, because while it was appropriate when
19 rendered, it became inappropriate in light of things.

20 And most likely that would occur in the context
21 of a change in the competitive environment where either
22 the patentholder ceased being a competitor or moved into a
23 widespread licensing, or even any licensing activities,
24 that indicated that there was no longer irreparable harm
25 from competition, money damages were now adequate, et

1 cetera.

2 If changed circumstances that were not present in
3 2011 came upon us, that would be one aspect of
4 Rule 60(b)(5) that we could have brought to Your Honor's
5 attention, and we would have the burden of proof to
6 establish that in light of those new facts -- first, that
7 the facts existed, and second, in light of them it was
8 inappropriate or unfair to continue the injunction, no
9 longer equitable in the rules of the rule.

10 We are in a different situation here. Our
11 situation as we have it is that the injunction was
12 predicated on a judgment. The judgment was the judgment
13 of infringement that was entered nunc pro tunc to
14 January 28, 2011.

15 THE COURT: You are going under Rule 60(b)(5),
16 the component that says, it has been based on an earlier
17 judgment that has been reversed or vacated.

18 MR. THOMASCH: That is correct. And I believe
19 that we would get to the same place, and I'll address that
20 differently from the perspective of the mandate, that this
21 is an appropriate exercise for the Court to determine on
22 remand from the Federal Circuit, but I just want to make
23 clear where it is that we're -- where we're going.

24 So we would argue and have argued in our papers,
25 Your Honor, that the order of injunction was itself

1 predicated on a different order, that being the judgment
2 of infringement. Had there been no judgment of
3 infringement, there would be no junction.

4 The judgment of infringement has been in part,
5 and in substantial part, reversed and vacated by the
6 Federal Circuit in its decision of November 21st, 2012.
7 We suggest, Your Honor, that if the proper facts had been
8 before the Court in 2011, the injunction would not and,
9 indeed, could not have issued. That's the basic
10 underpinning of this motion, is that the Court was
11 influenced in entering an injunction by evidence that
12 related to five patent claims in total, not one.

13 Two of those patent claims were systems claims
14 which are very important because, as Your Honor is aware,
15 a system claims come under 271-A which makes it an act of
16 infringement to make, use, or sell, whereas 271-B and C
17 that relate potentially to method claims do not make it an
18 act of infringement to sell something.

19 So there's -- the system claims are very
20 important here. Every aspect of the system was deemed by
21 the jury to be infringing when it was used in a
22 configuration, configuration two, three, or five.
23 Configurations two, three, and five the jury found in toto
24 amounted to infringing goods, and their use was also
25 infringing.

1 Now the issue of whether configuration two is
2 infringing, for instance, is off the table. There is no
3 doubt that -- I mean, the plaintiff has not challenged the
4 notion that the injunction must be modified and that the
5 injunction, as it pertained to configuration two, must be
6 dissolved *ab initio*.

7 They are not suggesting that somehow that had
8 continuing force up until November 21st. The Federal
9 Circuit found that the error that caused the reversal is
10 an error made at the summary judgment stage of the trial
11 court proceedings on the merits.

12 Had that error not been made, the jury would
13 never even have been presented with the issue of whether
14 the configuration two infringed the '172 patent. That
15 '172 patent wouldn't have been in the case at all. The
16 '683 patent would not have had in the case the fundamental
17 underlying system claim. There would have been a wholly
18 different analysis of the componentry and the parts,
19 because, as Your Honor is aware, configuration three is
20 the exact same configuration as configuration two except
21 that it includes Punchout.

22 Now, there was argument at the merits trial about
23 how somehow the injunction should be limited to RSS or
24 limited to Punchout or limited to RSS and Punchout, but at
25 the end of the day, Your Honor found, because of the

1 system claims, there's a basis to find the entire system
2 was infringing.

3 Well, now, everything that's in configuration
4 three except Punchout can be sold, can be used, and can be
5 sold and used without any question or complaint from
6 ePlus. The competition in the system that include RSS is
7 fair. It is not an infringement on their right. They
8 have no right to exclude competition for the sale of the
9 entire underlying core S3 componentry and the RSS or RQC
10 system. That configuration, which makes up --

11 THE COURT: Talking about configuration two?

12 MR. THOMASCH: Configuration two, which makes up
13 the vast majority of the configurations that were at issue
14 at the stage of the injunction. Your Honor may recall
15 that originally there was a configuration one that was in
16 the case, and the plaintiffs lost on that. That
17 configuration was the most popular configuration, and then
18 the second most popular was configuration two.

19 We're down to where there's only 137 or so
20 customers who, at the time of the injunction, possessed
21 either configuration three or five. Everybody wanted the
22 underlying modules, because they can be used full service.
23 They can be used for item master, for instance, and to do
24 all the things that you can do in item master, you don't
25 need configuration three or five for that. You only add

1 three and five if you want either Punchout or Punchout and
2 EDI.

3 But the configuration two module exists, there is
4 no dispute about the fact that competition over customers
5 for that module, for the guts of the system without the
6 add-on, is fair, and if there's any harm that's caused to
7 ePlus as a result of that, it's not harmed in any way that
8 relates to patent infringement.

9 It's just the harm that someone might have a
10 better product than they do and win sales in the
11 marketplace. That's not something this Court needs to
12 worry itself with.

13 Now, we think that this is a very, very
14 straightforward case about if the Court goes back and
15 looks at the injunction and says, can the injunction
16 stand, taking for the moment that Your Honor was correct
17 when you wrote Document 1019 and said, we're going to look
18 back at that test, if the Court goes in that direction as
19 we believe is appropriate --

20 THE COURT: Excuse me.

21 MR. DUSSEAULT: If the Court goes to the
22 four-factor test, as we believe is appropriate and would
23 certainly -- it cannot be disputed that the Court has the
24 right to do, it is within the discretion of the Court to
25 do, but if the Court goes there, we think it's a very

1 short trip from going there to dissolving the injunction,
2 and we rest primarily -- I mean, there's a lot of case law
3 cited in our briefs, but the case that stands apart is
4 *Apple v. Samsung*, 695 F.3d 1370. Federal Circuit decided
5 that case on October 11th of 2012, and rehearing en banc
6 was denied on January 31, 2013, so only a few months ago.

7 To my knowledge, it is the Federal Circuit's most
8 recent pronouncement, and it's a huge pronouncement that's
9 garnered enormous attention, The most recent pronouncement
10 on what is required for an injunction under the *eBay*®
11 four-factor test.

12 And the interesting thing there, Your Honor, is
13 we argued that at page 13 of our opening brief, we argued
14 it again in our reply brief. In between, that case is not
15 even cited in *ePlus*'s brief. There is no attempt
16 whatsoever to say that they could meet the findings, no
17 attempt whatsoever for *ePlus* to say that they could meet
18 the findings that *Apple v. Samsung* puts in place.

19 *Apple v. Samsung* is a case in which there was
20 patent infringement about a very interesting and important
21 feature of cell phones that were on the Samsung cell
22 phone. It was the searching technology that allowed a
23 user to search in, for instance, a name and come up with
24 that name from the phone's contact list and from where
25 that names appears in the internet, where that name

1 appears in email on the phone. It was an important
2 feature of the Samsung phone.

3 It also was a feature that had been previously
4 patented by Apple. So Apple sued for petition
5 infringement, and Apple won, and there was a finding that
6 there was infringement.

7 There was a hearing with regard to an injunction,
8 and the issue of irreparable harm was briefed at great
9 length, orally argued at great length, and, in the concept
10 of great length, I believe that the District Court's
11 decision in the Northern District of California was just
12 over 100 pages long, very, very detailed decision
13 analyzing the competition between Apple and Samsung in the
14 cell phone market and finding irreparable injury. That
15 finding ultimately was not disturbed.

16 There was irreparable injury because this was
17 effectively a two-player market where there wasn't
18 licensing and where these phones competed and these
19 features were important to the competition. Apple took
20 the position that case law that the Federal Circuit had
21 set up for some period of time permitted an injunction
22 under those circumstances.

23 It went up to the Federal Circuit, and Samsung
24 won, and Samsung won on the issue of the injunction, not
25 on the issue of whether they infringed. They lost. They

1 didn't win on the issue of whether or not there was
2 irreparable harm. They won on the issue of whether the
3 injunction was proper, and the Court put forward -- I'm
4 sorry. Mr. Krevitt, who was actually counsel of record in
5 the case and, thus, should be trusted more on details,
6 indicated to me it was a preliminary injunction, went up.
7 The test is the same on the four factors, but there needed
8 to be a likelihood of success, and that was shown.

9 That was not the reason when the Court upset the
10 preliminary injunction and vacated it. The reason appears
11 at page 1374 of the decision where the Court stated, to
12 satisfy the irreparable harm factor in a patent
13 infringement suit, a patentee must establish both of the
14 following requirements: One, that absent an injunction,
15 it will suffer irreparable harm; and two, that a
16 sufficiently strong causal nexus relates the alleged harm
17 to the alleged infringement. Both showings need to be
18 made.

19 Here, neither showing can be made on this record,
20 and Your Honor gave ePlus the chance to supplement the
21 record. I was surprised when they chose not to take that
22 opportunity, but I think --

23 THE COURT: Suspicion causal nexus exists what?

24 MR. THOMASCH: That a sufficiently strong causal
25 nexus relates the alleged harm to the alleged

1 infringement.

2 THE COURT: But that's different, isn't it, when
3 you have a preliminary injunction than in a final
4 injunction? The Fourth Circuit law sure is. They don't
5 have any patent cases on that topic, but they have a lot
6 of other cases that actually discuss what the difference
7 is in the preliminary stage and the permanent stage of the
8 injunction.

9 MR. THOMASCH: There isn't a difference in
10 irreparable harm. This is looked at as a function of
11 irreparable harm. The Court said, while we consider these
12 two factors --

13 THE COURT: Well, irreparable harm is different
14 in a final injunction than a preliminary injunction, isn't
15 it, according to the Federal Circuit?

16 MR. THOMASCH: The need to show irreparable harm
17 exists in both, and the need to show irreparable harm --
18 in a final context, I believe that the Federal Circuit
19 would have no difficulty finding that what is necessary is
20 that the strong causal nexus relates the proven harm to
21 the proven infringement as opposed to the alleged harm to
22 the alleged infringement, but it is the same causal nexus
23 that must exit.

24 There's nothing in this opinion that suggests in
25 any way, shape, or form this sort of limited reading, and

1 there's nothing that I'm aware of in any commentary since
2 that --

3 THE COURT: I don't know that it's a limited
4 reading. It's a different analytical approach to the
5 impact, I think.

6 MR. THOMASCH: I understand. Our position on
7 this, Your Honor --

8 THE COURT: I mean according to your --

9 MR. THOMASCH: In this context, there's nothing
10 in the opinion that suggested, and the Federal Circuit has
11 said that in both the situation involving preliminary
12 injunctions and permanent injunctions in a patent case,
13 the eBay® factors are -- must be applied, and the eBay®
14 factors are what this was about.

15 THE COURT: I don't think there's any question
16 that the factors have to be applied. In fact, that's the
17 fundamental meaning of the Supreme Court's decision in
18 *EBay*®, I understand. That's not what I'm asking.

19 I'm asking you whether the analytical calculus is
20 not different between how -- you can measure the harm and
21 the causal connection at the preliminary stage versus the
22 final stage. That is how you measure it, not whether you
23 measure it.

24 MR. THOMASCH: Well, here, the question really
25 becomes whether or not there needs to be a measurement,

1 because if there needs to be a causal nexus, it doesn't
2 exist in this record, and so the only --

3 THE COURT: That's your point, is that isn't a
4 causal nexus shown in the record.

5 MR. THOMASCH: There is nothing shown in the
6 record, and, indeed, Your Honor, I believe that the way in
7 which you would look at it, there is a concession that is
8 dispositive in this case. In the Apple case, the Federal
9 Circuit said, Apple has presented no evidence that
10 directly ties consumer demand for the, what is the Samsung
11 Galaxy nexus to its alleged infringing feature.

12 Now, our situation here, it's different because
13 we have concessions made in the record that the demand for
14 the product, the demand for the module that is necessary
15 in order for there to be an infringement, which is
16 Punchout -- if you don't have Punchout, you don't have
17 either configuration three or configuration five, but
18 Punchout does not drive demand for the product, and this
19 goes to irreparable harm, and I base that first on an
20 absence of any proof in the record that there is such a
21 demand, and secondly, on statements made, particularly at
22 paragraph 51 of ePlus's proposed findings of fact at the
23 injunction stage, which is docket 641, I believe.

24 EPlus argued for an injunction that not all of
25 Lawson's customers have procurement Punchout. Procurement

1 Punchout does not drive S3 sales, and Lawson has never won
2 a sale merely because of its Punchout product.

3 It went on in the same document to say that there
4 was no evidence that, quote, any customer would not have
5 purchased an S3 system if Lawson did not offer procurement
6 Punchout and that that not all customers that have
7 Punchout make use of it.

8 At that time, at that time, ePlus was attempting
9 to argue the balancing-of-equities factor and to say,
10 look, there isn't even going to be much harm to Lawson
11 from an injunction that captures within Punchout, because
12 Punchout doesn't drive anything. People don't buy this
13 because of Punchout, there's no showing that there's any
14 sales that are Punchout-dependent, and people who have
15 Punchout don't necessarily use it.

16 Those facts were marshalled by ePlus for a
17 different purpose. They were marshalled by ePlus to say,
18 so it's no big deal to Lawson if you enter an injunction,
19 but the facts are the facts. It doesn't matter why they
20 said those facts exist. Their factual statements,
21 proposed findings of fact based on the trial record was
22 that Punchout was not driving sales.

23 THE COURT: What pages in docket 461 are you
24 talking about?

25 MR. THOMASCH: I believe it's at page 25, Your

1 Honor.

2 THE COURT: You said it was at several pages.

3 MR. THOMASCH: I indicated that there were
4 paragraphs 51 through 53, and I think in the corrected
5 findings of -- proposed findings, that appears in the
6 record at DI-707-1. Those are the corrected findings.
7 It's paragraphs 51 to 53. Indeed, one of the
8 affirmative --

9 THE COURT: Docket number what was the second
10 one?

11 MR. THOMASCH: Second one, the corrected one, was
12 707-1.

13 THE COURT: All right.

14 MR. THOMASCH: Another point made in paragraph 53
15 was only ten or 11 percent of Lawson's customers even have
16 this, and so, again, the flip side of that coin is
17 relevant here where if you look at configuration three,
18 it's configuration two plus Punchout, and it's conceded
19 that we can compete on configuration two. All that
20 competition is in the marketplace.

21 There's no evidence in this record that I'm aware
22 of, and no evidence that ePlus has cited, that ePlus has a
23 Punchout-only module that it sells in competition with
24 Punchout. What it has is Content+ and Procure+ which it
25 described as being in competition for people who wanted to

1 add on to the underlying core to add RSS and Punchout.

2 They said, well, if you wanted to add RSS and
3 Punchout, we would have a product to sell. But, of
4 course, if you have configuration two, and, indeed, there
5 are individuals in this case there was testimony about who
6 do have configuration two and then later add on Punchout,
7 and then they become a configuration three customer.

8 But if they have configuration two, they wouldn't
9 go to Content+ or Procure+, because those are much bigger
10 products than the Punchout module only. So there isn't
11 even a substitute product that has been alleged, but they
12 have made the point that those, that product, those
13 modules that are necessary for infringement in this case
14 do not drive the sales, and so the infringement analysis
15 on claim 26 -- claim 26 requires that use of those
16 modules.

17 The same analysis would apply with regard to the
18 add-on module of EDI which is, frankly, almost never
19 mentioned. If you go through the submissions that ePlus
20 made, it's very, very rare that there's any reference to
21 Punchout or EDI except in the paragraph 51 to 53 and in
22 the very beginning where they have an introduction in a
23 couple of paragraphs that say, all of these configurations
24 infringe all of these claims. That's our point, Your
25 Honor.

1 Now, assuming we are correct that the record
2 doesn't contain evidence that would justify a finding of
3 an injunction under the four-factors test, then we don't
4 get to the alternative argument that the injunction would
5 be dissolved *ab initio*. And we do think that is
6 appropriate, and it's more than just because of the Apple
7 test. It really is that fundamentally they don't meet any
8 of the findings. The briefing sets that forth as to why
9 the record --

10 THE COURT: Before you get, move to another
11 point, I seem to recall that there was a petition filed in
12 Apple. Is it pending or not? It may have been that what
13 I've read is there was no petition filed. I can't recall.
14 Do you know, Mr. Krevitt?

15 MR. KREVITT: Your Honor, if I may, there was a
16 petition filed by Apple.

17 THE COURT: There was.

18 MR. KREVITT: There was, Your Honor.

19 THE COURT: Has it been dealt with?

20 MR. KREVITT: It has, Your Honor. In January of
21 this year, that petition was denied.

22 THE COURT: Okay.

23 MR. KREVITT: If you mean a petition to the
24 Supreme Court --

25 THE COURT: A petition for a writ.

1 MR. KREVITT: I'm sorry. There has not been.

2 THE COURT: Has the time run?

3 MR. KREVITT: There will not be. There's no
4 intention to file a writ to the Supreme Court.

5 MR. THOMASCH: Two small points before we move to
6 the alternative argument. One, what is replete through
7 ePlus's brief is that there is evidence in the injunction
8 record that relates in some way to claim 26 and that we
9 haven't shown, Lawson hasn't shown that that evidence
10 doesn't relate to claim 26.

11 We don't deny that there was evidence put in
12 generally as to all five, that was as to all the
13 configurations and all the claims, and essentially what it
14 was was competition for eProcurement systems. That's what
15 was being dealt with, Content+ and Procure+ versus
16 configurations two, three, and five. And that's what the
17 record shows, and there is nothing that you could go into
18 that record and segregate out and say, okay, I see, this
19 particular product, for instance, was only deemed to
20 infringe one patent, and because that claim has been
21 invalidated, we can take that out.

22 That's fine if it's nice and clean and severable,
23 but there's nothing severable about what's in there on the
24 '683 patent. The '683 patent was in there with respect to
25 the underlying system claim and the competition for the

1 eProcurement systems, and ePlus did not attempt to make
2 any record that there was specific competition that
3 related to the method of using the system that is patented
4 in claim 26.

5 And that's what they needed to do then, or Your
6 Honor gave them an opportunity now to come back and point
7 you to that specific evidence, and I believe you even
8 invited them to try to come forward with evidence that
9 could have been put in the record in 2011 had everyone
10 understood the real set of facts which is that, indeed,
11 the system claims don't matter because those patent claims
12 are invalid, and claims 28 and 29 don't matter because
13 those claims weren't actually proven to infringe, and this
14 all comes down to putting everything on the back of claim
15 26 alone.

16 They suggest that somehow they don't have to make
17 any such showing. I suggest to Your Honor that that
18 absolutely is what they must do, and the fact that all the
19 claims supported the injunction, that is not at issue
20 anymore. We don't have to deal with whether all the
21 evidence under all the claims supported everything you
22 enjoined, because everyone knows that the injunction has
23 to be modified in part because of the decision from the
24 Federal Circuit.

25 I would like to go back to the mandate issue,

1 Your Honor, and deal with that for a moment, and there's
2 only one case I want to raise in that regard because I
3 think it's so thoroughly on point, and that is *Amado v.*
4 *Microsoft* which Your Honor would find at 513 F.3d 1353.
5 That is a 2008 case from the Federal Circuit. Amado sued
6 Microsoft and won. They received an award of past damages
7 in the form of a royalty of four percent per unit that had
8 been sold up to the date, and going forward they received
9 a permanent injunction.

10 The District Court, however, stayed the
11 injunction and said that it would go into effect seven
12 days after the appeal was resolved or abandoned. The
13 District Court also required that Microsoft put into
14 escrow a significant sum of money, more than the \$0.04 per
15 unit, but actually I believe \$2 per unit to put into
16 escrow so that if it turned out that Amado won the appeal,
17 there would be no doubt but that the money that would
18 relate to infringement during the time of the stay would
19 be available for Amado.

20 So Microsoft was continuing to sell goods that
21 had been found to be infringing. The injunction against
22 doing that had been entered but stayed. In effect,
23 damages were accruing in the event that the stay was of an
24 injunction that was proper. So that's the procedural
25 situation as it goes up to the Federal Circuit.

1 When it went up to the Federal Circuit, Microsoft
2 said, we should have won on the merits, we shouldn't have
3 been enjoined, and Microsoft lost across the board, and
4 the mandate issued. The only thing that the mandate
5 remanded the case to the District Court for was
6 disposition of funds held in escrow during the stay.
7 That's what the Court remanded it back for, disposition of
8 the funds.

9 Now, while the case was in the Federal Circuit,
10 eBay® came down from the Supreme Court, and when it got --
11 when the the case got back after the mandate from the
12 Federal Circuit, which was after eBay® was decided, it
13 goes back to the District Court, and Amado says, it's been
14 seven days, the injunction should go into place, and I
15 should receive the money held in escrow.

16 The District Court, however, extended the stay of
17 the injunction and said, I want to know whether or not the
18 injunction I previously issued was proper under the eBay®
19 factors, and there was a hearing. After the end of that
20 hearing, the district judge said, no, without the
21 presumption that existed prior to eBay®, there shouldn't
22 have been an injunction.

23 So the judge indicated in that situation that he
24 was going to award damages for the time period under the
25 stay but dissolve the injunction thereafter.

1 It went back up to the Federal Circuit, and Amado
2 said, you can't do this -- the District Court couldn't do
3 this. The injunction and the underlying merits were all
4 decided in our favor, and the mandate said nothing more
5 than dispense the funds held in escrow. And the Federal
6 Circuit in the Amado case specifically stated, an
7 appellate mandate does not turn a district judge into a
8 robot.

9 They went on to talk about how the judge had
10 every right, broad discretion to at any time revisit
11 whether an injunction is proper under the law and that the
12 judge did the right thing, it was not an abuse of
13 discretion, and Microsoft prevailed on that appeal, the
14 injunction was dissolved, notwithstanding that nothing
15 about the injunction at all was in the mandate, and,
16 indeed, in the Federal Circuit decision, Amado won every
17 issue.

18 They were totally unlike this case where most of
19 the case was reversed or vacated and one claim against two
20 configurations was upheld.

21 I think what *Amado* ultimately says is that an
22 injunction is the application of facts to a legal
23 framework. In *Amado*, the District Court looked and said,
24 you know, when I entered that injunction, I was working
25 with one legal framework, and that proved not to be

1 correct. I need to look at whether the facts match up
2 with the right legal framework.

3 We are the flip side of that coin, Your Honor.
4 Your Honor applied a set of facts that existed after the
5 merits trial and the judgment in favor of ePlus which was
6 very broad. You took those facts, and you applied it to a
7 legal standard.

8 Now, wholly apart from whether *Apple* has changed
9 the legal standard to make it even tougher, which I would
10 suggest it has, the facts have undeniably changed. The
11 facts that you based it on, finding two system claims to
12 be infringed, finding configuration two to be infringing,
13 those facts available to Your Honor have been proved
14 inaccurate over time.

15 Now the question is, Your Honor has every right,
16 and whether or not it's mandated or not I don't think is
17 the question, because *Amado* says you are not a robot, you
18 have the right to do this, and I believe Your Honor will
19 do that which is right.

20 What is right is to look back and say, if the
21 right set of facts exist, why should Lawson be prejudiced
22 because an error in good faith was made about the validity
23 of two patent claims? There's no reason that Lawson
24 should be prejudiced by that. We should go back and look
25 at it without the erroneous information. We should look

1 back and strip the record of everything that relates to
2 four of the five claims and one of the key configurations,
3 the configuration that is everything but the add-on
4 modules, and when you look at that, the issue is, is what
5 is left enough, and the answer is, it's not even close.
6 It's not even close.

7 If it wasn't for the contempt proceeding and
8 everything that's been built up about this, we wouldn't
9 have this issue. It would be so readily apparent and so
10 obvious.

11 THE COURT: How's that? I'm not following.

12 MR. THOMASCH: Because there's nothing there.
13 There is no showing that in any way, shape, or form there
14 was irreparable harm because Punchout and the ability to
15 use Punchout or use Punchout and EDI in a specific way
16 that allowed for the checking of inventory, which is, of
17 course, necessary for claim 26, that that step to check
18 inventory somehow affected the competitive relationship
19 between ePlus and Lawson.

20 Remember, the testimony is clear. You can use
21 Punchout and use EDI and never infringe claim 26 because
22 either -- because the vendor that you are communicating
23 with may not have the capacity so send back something.

24 THE COURT: I understand that, but that's not
25 what I was asking. You say we wouldn't be here if it

1 weren't for the contempt proceedings.

2 MR. THOMASCH: Because honestly, Your Honor --

3 THE COURT: You mean they would have dropped the
4 contempt issue?

5 MR. THOMASCH: What I was suggesting is I think
6 that the injunction here, any attempt to keep an
7 injunction after what the Federal Circuit did in light of
8 the law under the *eBay*® case and under the *Apple* case --

9 THE COURT: It's just an effort to bootstrap the
10 reason to give a contempt citation.

11 MR. THOMASCH: It is. It's a hail Mary, Your
12 Honor.

13 THE COURT: Is that what you are saying?

14 MR. THOMASCH: Yes. I believe that's all that
15 this comes down to, and if Your Honor, without regard to
16 whether you have to or not, if you simply say it is fair
17 to try to re-evaluate whether Lawson should have been
18 enjoined under the real facts where it's only claim 26
19 that is not invalid and infringed, I think then the answer
20 will resolve itself pretty quickly.

21 I think at the end of the day, they're hoping
22 that you continue to give them the credit for spillover
23 evidence that doesn't relate to claim 26 alone, doesn't
24 relate to Punchout or EDI alone, but relates to the 2011
25 framework in which total competition in eProcurement

1 systems was what was at issue. That's no longer at issue,
2 Your Honor.

3 THE COURT: All right.

4 MR. THOMASCH: The alternative argument that I
5 don't believe the Court needs to or should reach in
6 today's -- in the context of this proceeding is if somehow
7 the record contains sufficient evidence to allow for an
8 injunction, or if Your Honor feels that you are not
9 mandated to do so and you choose not to do so even though
10 you absolutely have the right to, and you don't go back
11 and look at that and you say, there's going to be a
12 continuing injunction, then the question becomes, what is
13 the scope of that injunction, and I think that the obvious
14 things are that configuration two cannot be part of the
15 injunction.

16 It was supported only by an invalid claim of the
17 '172 patent. I think that claims 28 and 29 cannot be part
18 of an injunction when they were not proven at trial, and I
19 think that it is equally self-evident that the sale of any
20 configuration, particularly remembering that the accused
21 infringing products that we have been talking about are
22 configuration three and configuration five, that's what
23 the injunction is, the whole configuration, that you
24 couldn't reasonably enjoin the sale of the full
25 configuration when there are absolutely substantial

1 non-infringing uses, and in that regard, Your Honor --

2 THE COURT: Is that what you mean?

3 MR. THOMASCH: Yes.

4 THE COURT: Because you argue broader than that.
5 You argue you can't enjoin the sale at all, and that is
6 not what the -- I don't understand how the Federal Circuit
7 could have issued a decision that it issued if it didn't
8 understand that the injunction applies to the sale of what
9 was defined in the injunction, because the undisputed
10 evidence is the only way this product ever gets out to the
11 market is if you sell it.

12 MR. THOMASCH: I understand. I understand.

13 THE COURT: And that argument that you make in
14 your brief is way too broad. You are now narrowing it to
15 say that you can't enjoin the sale of configuration two
16 even if you find it's sufficient to enjoin the sale of
17 configuration three and five.

18 MR. THOMASCH: That is not actually my argument,
19 Your Honor. Configuration two I take off the chart
20 without regard to contributory infringement on the
21 grounds --

22 THE COURT: You mean of the elements that add on
23 to two to form three and five.

24 MR. THOMASCH: Right. What I would argue, Your
25 Honor, is that the injunction goes to configurations three

1 and five, and those configurations undeniably have
2 substantial non-infringing uses including everything that
3 can be done with configuration two can be done with three
4 and can be done with five.

5 Because there are undeniably substantial
6 non-infringing uses, then in that situation, a method
7 claim will not allow for an injunction against the sale of
8 a product, and it is important to me, Your Honor, that
9 when the Federal Circuit looked at the liability under
10 claims 26 and it said Lawson was liable, the Federal
11 Circuit full well knew that we sold the product.

12 The Federal Circuit said that there was evidence
13 to show that Lawson itself infringes claim 26. This is at
14 page 520 to -21 of the been, 700 F.3d 509, 520 to 212.
15 The Court continued, in particular, there is evidence that
16 Lawson installed, maintained, demonstrated, and managed
17 the infringing systems for its customers. That's what the
18 court said.

19 The Court didn't say that the sale was an
20 infringement of claim 26, and the sale is not an
21 infringement of claim 26 if there is a substantial
22 non-infringing use which there are.

23 Your Honor has previously said --

24 THE COURT: Who is it that testified that there's
25 a non-infringing use, and what is the non-infringing use

1 that you are referring to?

2 MR. THOMASCH: The non-infringing use that I'm
3 referring to includes but is not limited to every use --

4 THE COURT: You have to give me everything.

5 MR. THOMASCH: It is every use of configuration
6 two. Anything that you can do with configuration two you
7 can do with configuration three and configuration five,
8 and when you do that, when you do that, you are not
9 infringing a valid patent claim, and on that there can be
10 no dispute.

11 The fact there were substantial uses to
12 configuration two is not in reasonable dispute. There was
13 an entire trial over the infringement of configuration
14 two. The jury found -- heard about the uses of
15 configuration two.

16 THE COURT: I understand. I just was asking.
17 Who testified to all that?

18 MR. THOMASCH: I believe --

19 THE COURT: What evidence am I going to use to
20 find that there's a non-infringing use?

21 MR. THOMASCH: I believe it is self-evident from
22 the fact that configuration two was previously accused and
23 found to be infringing and was enjoined by Your Honor.
24 You would not have enjoined it unless there was a use to
25 the product, and now competition in configuration two is

1 permissible.

2 The test for substantial non-infringing use is
3 exceedingly low, and what needs to be shown is just that
4 there's some basis in reality for a belief that someone
5 could use the product for that purpose.

6 This is in addition to configuration two, when
7 just using three and five, you can certainly check stock
8 items or check specials, or you can use it with a vendor
9 that does not have the capacity to send back and does not
10 send back a confirming message on inventory. And in all
11 of those situations, there is no infringement, because you
12 haven't practiced all of the steps of claim 26.

13 That was admitted by Dr. Weaver, and it was the
14 subject of -- it is the subject of testimony, and on the
15 issue of burden, Your Honor, it is very important here.
16 Your Honor made a comment during Dr. Weaver's testimony
17 that it was somehow Lawson's burden to establish
18 non-infringing uses. The law is to the contrary, Your
19 Honor. It is directly --

20 THE COURT: It is your burden to bring up the
21 non-infringing use. There isn't any question about it.
22 You have to identify it as an issue, and then what happens
23 with respect to the burden of proof is different, but the
24 burden of bringing it forward is yours. They do not have
25 to come in and prove every non-infringing --

1 non-infringing uses in order to prevail.

2 MR. THOMASCH: It is our position -- I understand
3 Your Honor disagrees with it. It is position that the
4 language of 271(c) is quite specific --

5 THE COURT: Is that the authority on which you
6 are basing the argument?

7 MR. THOMASCH: Our authority in addition to
8 271(c), plain language, is *Toshiba v. Imation Corp.*, 681
9 F.3d 1358, Federal Circuit 2012 at pages 1362 to 1363.

10 THE COURT: Is that in the briefs?

11 MR. THOMASCH: I do not --

12 THE COURT: I don't see it cited.

13 MR. THOMASCH: I do not believe Toshiba is,
14 because this question of burden --

15 THE COURT: What's the citation again?

16 MR. THOMASCH: The citation is 681 F.3d 1358 at
17 1363, Federal Circuit 2012, and I would read one brief
18 point and that is, the Court stated, the Federal Circuit
19 stated, we agree with appellees, the alleged infringers,
20 the infringers. We agree with appellees that Toshiba --
21 I'm sorry. I'm sorry, Your Honor. Let me change that.

22 The statement is, we agree with appellees that
23 Toshiba failed to proper evidence that creates a genuine
24 issue of material fact. Because Toshiba had the burden to
25 prove the lack of substantial non-infringing uses, Toshiba

1 was required to put forth evidence showing that the use of
2 unfinalized DVDs was not substantial.

3 Toshiba is the patent holder and the plaintiff in
4 the case, and the Federal Circuit said Toshiba had the
5 burden to prove the lack of substantial non-infringing
6 uses, and the Federal Circuit was not creating new law.

7 It cited *Golden Blount, Inc., v. Robert H.*
8 *Peterson Co.*, at 438 F.3d 1354, 1363, Federal Circuit
9 2006.

10 So we did bring the matter to the Court's
11 attention on this motion. This issue about sale, if there
12 is going to be an injunction, can it cover the sale of
13 configurations where the configurations as a whole have
14 substantial non-infringing uses. We briefed that in both
15 of our briefs. That has never been, in any way, shape, or
16 form, a matter of surprise whatsoever.

17 The response has been largely that the systems
18 don't have substantial non-infringing uses because the
19 Federal Circuit didn't go to that argument in its opinion.

20 With regard to all of the uses that derive from
21 configuration two, that you can use configuration two, the
22 substantial non-infringing use didn't exist until the
23 Federal Circuit decided the case on November 21st. At
24 that point, it said, in effect, competition in regard to
25 configuration two is permissible, and we know that

1 configuration three and five do everything that two does.
2 Those are uses of the enjoined configurations that are not
3 infringing, and so it's absolutely clear in that regard.

4 There isn't a dispute, but the burden is to show
5 we've raised the issue, and the evidentiary burden would
6 be on the plaintiff to show that there is no substantial
7 non-infringing use, and they can't do that. The testimony
8 of their own witness indicated that on specials, on stock
9 items, and with vendors that do not have the requisite
10 electronic technology, you can't infringe claim 26 even if
11 you are using configuration three and configuration five.

12 So this part of the motion comes up under the
13 Rule 60(b)(5) element applying it prospectively is no
14 longer equitable. It is longer equitable to ignore the
15 uses of configuration two in light of the Federal
16 Circuit's decision of November 21st of last year.

17 Finally, Your Honor, I just want to note one last
18 argument that I think need not take long to address, but
19 at page 21 of the opposition brief, ePlus argues in the
20 middle of page 21, quote, indeed, under Lawson's argument,
21 ePlus would have no remedy at all for Lawson's affirmed
22 infringement of claim 26.

23 THE COURT: That's right, isn't it?

24 MR. THOMASCH: That's not right.

25 THE COURT: The only thing they can do is sue you

1 down the road.

2 MR. THOMASCH: They absolutely can sue us down
3 the road.

4 THE COURT: That's their point, I think.

5 MR. THOMASCH: They can sue us for willful
6 infringement. They can sue us for treble damages. They
7 could have chosen, but didn't -- I mean, you gave them an
8 option, and I would suggest there were two options
9 available to them after the Federal Circuit decision.

10 One option was to try to put evidence in the
11 record that would justify an injunction. It's not good
12 enough, Your Honor, to say, I had the opportunity to do so
13 but I declined, because why do I need to put anything in
14 the record? You can't leave me remedy-less.

15 I mean, that's not an effective argument. If
16 they are not entitled to a particular remedy, in this case
17 injunction, then they don't get it. Whether that leaves
18 remedy-less or not doesn't matter. The question is, are
19 they are entitled to an injunction, and under the facts
20 that are accurate and the law that is current, they are
21 not.

22 THE COURT: I know, but the point is, it does
23 leave them without a remedy.

24 MR. THOMASCH: They could have -- they could have
25 chosen -- I don't think --

1 THE COURT: Isn't that right?

2 MR. THOMASCH: I don't think it is without a
3 remedy, because they have a patent claim that has been
4 adjudicated, so we wouldn't, for instance --

5 THE COURT: It leaves them without a remedy in
6 this case. You have to acknowledge that. Can they do
7 something else? Can they bring another suit? Of course
8 they can bring another suit.

9 MR. THOMASCH: Yes.

10 THE COURT: That's not the point that they are
11 making. Whether or not that is relevant is a different
12 issue.

13 MR. THOMASCH: But this question about the
14 injunction, this is a question about the injunction that
15 was written against RSS in May of 2011. This is not a
16 question that's linked into the contempt case necessarily.
17 This is really about the original injunction was based on
18 a finding of infringement. The finding of infringement
19 was substantially reversed or vacated, and we brought --
20 before there was a contempt proceeding, we brought a
21 motion asking for dissolution or modification.

22 THE COURT: What? Before there was a contempt
23 proceeding?

24 MR. THOMASCH: Before there was a hearing on the
25 contempt proceeding.

1 THE COURT: Okay.

2 MR. THOMASCH: That existed independently. We,
3 for instance, are in a situation where because claim 26
4 has been valid and infringed, and because of what the
5 Federal Circuit said on it, if an injunction doesn't issue
6 right now, if there's no injunction, we're not somehow
7 free to go back to RSS and use it.

8 We would love to go back to RSS, at least the
9 functionality of Punchout. The functionality of Punchout
10 we would love to restore, but we're not going to restore
11 that, because the Federal Circuit has said doing so and
12 then maintaining that and servicing that, that would be an
13 infringement, and we don't want to be sued for treble
14 damages.

15 THE COURT: The point, I suppose, that bears some
16 consideration in this is that there's evidence in the
17 contempt proceeding that you are using and were using RSS,
18 and what you did, in essence, is set up a mechanism, your
19 design-around, set up a mechanism in which you knew well
20 that simply by changing some tabs, all you had to do, if
21 you were a customer, to use RSS was to do that and you
22 could use it, and you all put something in front of it to
23 insulate it.

24 That's one inference that could be drawn, and
25 you, therefore, are continuing to allow by what you have

1 done and by not saying, you can't do this this way
2 notwithstanding that conceptually it can be done by
3 running in parallel, that you are in continued violation
4 of infringement right now, and that, therefore, an
5 injunction is appropriate.

6 MR. THOMASCH: I think that inference is entirely
7 unwarranted and contrary to the evidence --

8 THE COURT: I understand there's another side to
9 it.

10 MR. THOMASCH: Thank you. There is another side,
11 and we'll present it --

12 THE COURT: I didn't make any finding. You can't
13 have sat through the testimony I sat through and not
14 understood that that argument is there.

15 MR. THOMASCH: I understand that argument is
16 there, and I understand full well the facts about it.

17 THE COURT: I understand the other side of it,
18 too.

19 MR. THOMASCH: If you presuppose for the purposes
20 of argument that that constituted infringement, that that
21 was the use of RSS in an infringing way, then they would
22 have a lawsuit against us, and they'd have a lawsuit for
23 treble damages against us. We don't get a free ride out
24 of this.

25 THE COURT: And they could reach back for how

1 long?

2 MR. THOMASCH: Six years. They could reach back
3 for six years. They could capture every action that's at
4 issue. They could have discovery about it, they could sue
5 us for treble damages. They could say it's an exceptional
6 case because we did so after all of this evidence, and
7 they could seek their fees. There is a whole raft of
8 things they could do, and I will tell you --

9 THE COURT: That wraps up your argument, does it?

10 MR. THOMASCH: Yes, it does, Your Honor.

11 THE COURT: And it could be assigned to another
12 judge is the end of the argument. Did you have anything?
13 I think you made your point.

14 MR. THOMASCH: I do want to note, Your Honor,
15 that at the time of the injunction, they had a right to
16 ask Your Honor, and Your Honor had every authority under
17 Federal Circuit law, *Paice v. Toyota* being a leading case
18 in this regard, Your Honor could have imposed an ongoing
19 royalty in this case had you sought -- had you wanted to
20 do so.

21 You had the power to do that. That existed.
22 They intentionally declined that. What they've done is
23 take all the traditional remedies that would be available
24 in their situation, and they've either disqualified
25 themselves from it by their own discovery misconduct, or

1 by election they have said, don't give me lesser remedies
2 so that they can say, I want a huge remedy, and I want
3 injunctions, and I was disgorgement for violations of
4 injunction, I want all of this, and if you don't give me
5 that, Your Honor, I'm some pathetic orphan --

6 THE COURT: They are making the orphan argument.

7 MR. THOMASCH: Yeah, they're making the orphan
8 argument, and the orphan argument is an unattractive
9 argument, and it does a disservice to orphans everywhere,
10 Your Honor.

11 THE COURT: We are going to take a recess because
12 I have to go now judge whether we're going to have a
13 suitable flooring in our elevator, so we'll be 25 minutes.

14
15 (Brief recess.)
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1 THE COURT: All right.

2 MR. STRAPP: Your Honor, we have some slides
3 to hand up.

4 THE COURT: Thank you.

5 MR. STRAPP: And I want to start with slide
6 2.

7 Your Honor, I think that the one thing that
8 we don't dispute because there's a lot that is in
9 dispute is that this is Lawson's motion. They are the
10 ones who filed this Rule 60(b) motion. And, of
11 course, since they filed the motion, they are the ones
12 who bear the burden here. It's their burden to show
13 that Rule 60(b) should be invoked by Your Honor to
14 either, as they request, dissolve the injunction *ab*
15 *initio* or to modify the injunction.

16 THE COURT: There are two questions. One is
17 the Federal Circuit has said I have to consider how to
18 modify the injunction. It didn't say whether to
19 modify it. It said how, right?

20 MR. STRAPP: Right.

21 THE COURT: And then in addition to that,
22 they filed a motion to dissolve the injunction, and
23 they say that's the way of getting it on the table.
24 So I'm not quite sure exactly what burden lies at
25 juncture.

1 MR. STRAPP: Well, I think, Your Honor, if
2 you look at the mandate from the Federal Circuit, what
3 it directed Your Honor to do, it set out the last
4 sentence, it says, We remand for the District Court to
5 consider what changes are required to determine the
6 injunction consistent with this opinion. In all other
7 respects, we affirm.

8 I think certainly if the Federal Circuit had
9 in mind dissolution of the injunction in its entirety
10 or *ab initio*, as Lawson's urges Your Honor to do, it
11 would have said so. That's nowhere, I don't think,
12 found anywhere in the Federal Circuit's opinion in the
13 *eBay* case, and I think that to the extent that
14 Lawson's wants to prevail on that request to dissolve
15 the injunction *ab initio*, it's their burden to do so.

16 In light of that burden, what I found
17 surprising personally was that when we were on a call
18 with Your Honor regarding this motion and whose burden
19 it was, Your Honor asked Mr. Thomasch on behalf of
20 Lawson whether they requested an evidentiary hearing
21 or whether they requested to put in some evidence to
22 meet the burden that they have under this Rule 60(b)
23 motion. And Lawson suggested that they needed no new
24 evidence and they required no evidentiary hearing to
25 meet the burden to show that they are entitled to the

1 relief of dissolving this injunction, even though
2 there is no hint in the ePlus Federal Circuit opinion
3 that dissolution of the injunction is the appropriate
4 course for Your Honor to take. I just want to start
5 with that.

6 Now, Your Honor, I think given the nature of
7 Lawson's request here, which is let's start over from
8 scratch, get rid of the injunction, and then, ePlus,
9 go file a new patent lawsuit and we'll start over. We
10 understand you have no relief here, but let's just
11 start the whole thing over from scratch and forget
12 about what happened. I think what's interesting is
13 that in light of that premise, which seems a little
14 bit extreme and radical, you would think that there
15 would be some support in the case law for following
16 this course of action.

17 But, Your Honor, the cases that were
18 mentioned during the oral argument and the cases that
19 are mentioned in Lawson's brief are scant of any
20 support for the notion that in a situation like this
21 that you, first of all, you need to reevaluate the
22 four factors at all.

23 In fact, Lawson hasn't cited a single case in
24 which a court faced with this situation, a district
25 court who had a mixed appeal decision where it was

1 reversed in part, affirmed in part, and remanded for
2 further consideration, in that kind of situation there
3 is no case post *eBay* where a district court has said
4 "I need to rehear and understand and reevaluate all
5 the evidence that came in that was in support of my
6 *eBay* injunction decision and determine whether that
7 injunction is still appropriate in light of that
8 evidence."

9 That's simply a course of action being urged
10 by Lawson without precedent or without support in the
11 case law. I think, in contrast, what's interesting is
12 there's cases in which courts have taken the opposite
13 approach. And if I could just direct your attention
14 to slide 15. There are several instances we found in
15 cases similar to this where the Federal Circuit
16 affirmed in part and reversed in part and vacated to
17 the district court to consider what further changes
18 were necessary to an injunction that had already been
19 issued. And in each of those cases, the ones we cite
20 here are *Pfizer*, *MPT*, and *Broadcom*. In each of those
21 cases, the district court didn't conduct a new
22 evidentiary hearing on the propriety of an injunction
23 in light of the evidence that had formerly been
24 adduced, but instead went ahead and blue penciled the
25 injunction order that was already in place and took

1 out, for example, a claim that had been found invalid
2 or took out, for example, a claim that was determined
3 not to be infringed by the Federal Circuit.

4 That's the course of action that seems most
5 straightforward and that's been endorsed by all the
6 cases that we've seen in the post *eBay* decision-making
7 universe.

8 Lawson has certainly cited nothing to the
9 contrary in support of the radical proposition that we
10 need to reevaluate in its entirety the whole body of
11 evidence that came in before Your Honor during the
12 proceeding two years ago.

13 Lawson also hasn't cited any case that would
14 suggest that in a circumstance like this the
15 appropriate course of action is to just dissolve *ab*
16 *initio*, as Mr. Thomasch put it, the injunction.

17 In fact, the only case that Mr. Thomasch
18 mentioned on this point in his argument was this *Amado*
19 case. Now, the *Amado* case, it's an interesting case
20 because, as Mr. Thomasch points out, it was decided
21 right around the time of *eBay*. So when the district
22 court proceedings were ongoing and evidence was coming
23 in regarding whether or not an injunction was
24 appropriate, that district court didn't have the guide
25 of the Supreme Court's *eBay* decision.

1 I don't think it's a surprise that when the
2 case was remanded to the district court, the district
3 court said, Well, I have new directive and
4 instructions from the Supreme Court about how I must
5 go about interpreting and evaluating evidence
6 regarding an injunction.

7 And that in instance, the district court
8 decided it was appropriate to conduct an evidentiary
9 hearing.

10 THE COURT: *EBay* come down after the mandate
11 of the Federal Circuit?

12 MR. STRAPP: Yes, *eBay* came down in the
13 intervening period between the injunction being
14 initially entered by the district court and the
15 Federal Circuit's decision.

16 THE COURT: The Federal Circuit's mandate
17 said, Go collect the money that's in escrow.

18 MR. STRAPP: Right.

19 THE COURT: In the meantime, then out came
20 the Supreme Court's decision in *eBay* that changed the
21 legal landscape by which the injunction was to be even
22 considered.

23 MR. STRAPP: That's correct. And because the
24 district court reconsidered the injunction evidence in
25 light of *eBay*, I think it makes -- it's entirely

1 understandable why the district court did that. There
2 was this intervening decision. But what's interesting
3 is if you look at the seven years post-eBay because
4 eBay was decided by the Supreme Court in 2006, there
5 hasn't been any other case that we've seen that we are
6 aware of where there's this kind of decision from the
7 Federal Circuit, and then the district court gets the
8 case back and starts going through all the injunction
9 evidence again. There's not one case that we're aware
10 of. And we've cited cases where that hasn't happened.

11 Now, I think, you know, what's also
12 interesting, and I guess it's sort of the flip side of
13 the same coin is that Lawson hasn't cited any decision
14 that would suggest that when a case comes back down
15 from the Federal Circuit in these circumstances, that
16 you have to sort of scrub over and take a look at what
17 evidence had come in and decide and parse whether that
18 evidence supported the part of the verdict that still
19 stands after the Federal Circuit decision. That makes
20 sense here especially.

21 When the injunction proceedings took place
22 back in March 2011 and April 2011 and there was
23 extensive evidentiary hearing, briefing, findings of
24 fact, and eventually led to a 63-memorandum opinion
25 from Your Honor on May 23, 2011, that evidence,

1 contrary to the suggestion in Lawson's brief, wasn't
2 focused on the system claims, wasn't focused on Claim
3 One of the '172 Patent.

4 The evidence came in in its entirety and
5 considered all of the patent claims that were then
6 found to be infringed, all five of them, as well as
7 the three system configurations that were at issue.
8 Configurations 2, 3 and 5.

9 Now, had it been the case back in March 2011
10 that Lawson decided, ePlus, you met your burden on
11 configurations 2 in the system claims, but you didn't
12 bring out any evidence with respect to configurations
13 3 and 5 or Method Claim 26. So to the extent an
14 injunction is to be entered, it should be limited just
15 to the system claims in configuration 2. That's an
16 argument they could have made and apparently that's an
17 argument they should have made by their own admission
18 because, according to Lawson, there wasn't sufficient
19 evidence in the record to support even at that time an
20 injunction that would have applied to Claim 26 and to
21 configurations 3 and 5.

22 But no such argument was made either before
23 the injunction issued or after in a motion that Lawson
24 filed to modify and to clarify the injunction. That
25 was an argument that was never raised. That's a new

1 argument that's newly minted after the Federal
2 Circuit's decision in which Lawson attempts to take a
3 large record body of evidence and say it only applies
4 to system claim or it applies primarily to system
5 claims and could not support an injunction that would
6 apply to Method Claim 26 and configurations 3 and 5.

7 I'll discuss in a little bit why we believe
8 that's not the case and why the evidence that was
9 adduced back two years ago supports an injunction that
10 would apply to configurations 3 and 5 in Claim 26.

11 Now, Your Honor, an argument that was made in
12 the alternative by Lawson and by Mr. Thomasch today is
13 that if the Court does not dissolve the injunction *ab*
14 *initio*, that the injunction should be modification.

15 The primary justification for Lawson's
16 request to modify the injunction is that it should be
17 permitted to sell configurations 3 and 5 to its
18 customers.

19 Now, it makes this argument notwithstanding
20 the Federal Circuit's finding that there's
21 infringement of Claim 26 both by Lawson and by its
22 customers. But Lawson says, notwithstanding that
23 finding of the Federal Circuit, we should be permitted
24 to go ahead and continue selling configurations 3 and
25 5 to our customers.

1 First of all, it just sort of defies logic
2 that they should be permitted to go sell
3 configurations that will be used by their customers to
4 infringe Claim 26 when we know that infringement is
5 ongoing, both by Lawson and its customers, but it also
6 doesn't make sense as a matter of law.

7 If I could direct Your Honor's attention,
8 please, to slide 13. On slide 13, what we've done is
9 collected some of the cases that appear post *eBay* in
10 which district courts have entered injunctions that
11 prohibit the sale of products that are used to
12 infringe method claims. This is slide 13.

13 And what's interesting here is that the
14 premise of Lawson's legal argument for their
15 alternative argument is that if all that's at issue
16 here is a method claim, which concededly that's all
17 that is at issue, it's Claim 26, that an injunction
18 can't reach so far as to prohibit sales of a product
19 that's used to practice that method claim.

20 Well, that's wrong for a few reasons, but we
21 know it's wrong, too, when we see that there's
22 district courts affirmed by the Federal Circuit in
23 several instances in the post *eBay* world that have
24 done exactly what Lawson is saying Your Honor cannot
25 do as a matter of law.

1 Eye for Eye is one example. *Tristata*, the
2 argument was specifically raised and rejected. So
3 this is another instance, I think, where Lawson is
4 urging Your Honor to take --

5 THE COURT: What case?

6 MR. STRAPP: Well, on slide 13, the first
7 case that's on slide 13 is a case called *Tristata*,
8 T-r-i-s-t-a-t-a.

9 THE COURT: I just didn't hear what you were
10 saying.

11 MR. STRAPP: Right. In that case, the same
12 argument was made there as is being made by Lawson,
13 which is an injunction can't reach so far as to
14 prohibit sales. That argument was raised and was
15 rejected. The Federal Circuit has affirmed --

16 THE COURT: How does any of the configuration
17 3 or 5 ever get maintained, installed, serviced, etc.,
18 if it's not sold? How does that ever happen?

19 MR. STRAPP: That's another reason --

20 THE COURT: What's the record on that?

21 MR. STRAPP: There is no record evidence
22 whatsoever that there's ever been a configuration of
23 any of the software sold that wasn't also maintained
24 and serviced. That's part of the contract. If --

25 THE COURT: Beyond what's not there, the

1 evidence is that Lawson sells these configurations,
2 and that it does so by way of a license agreement, and
3 that attached to the license agreements often are
4 maintenance agreements, correct?

5 MR. STRAPP: That's correct, Your Honor.
6 And, in fact, that's what the Federal Circuit found at
7 pages 520 and 521 of its opinion. It said there that
8 the record contains substantial evidence to show that
9 Lawson itself infringes Claim 26. In particular,
10 there is evidence that Lawson installed, maintained,
11 demonstrated, and managed the infringing systems.

12 THE COURT: But they draw comfort from the
13 language that you just quoted by virtue of the fact
14 that it does not mention sales.

15 MR. STRAPP: And I think it's interesting
16 that they do draw comfort from that because the only
17 portion of the opinion, the Federal Circuit opinion,
18 that actually addresses the arguments that were made
19 with respect to the injunction, because you'll recall,
20 Your Honor, that Lawson appealed several issues to the
21 Federal Circuit. Some had to do with infringement of
22 the method claims. Some of the arguments were related
23 to the invalidity of certain claims.

24 Now, other arguments were directed to Your
25 Honor's injunction. And there's a section of the

1 Federal Circuit opinion that addresses those
2 arguments. That's at pages -- that's at page 522 of
3 the Federal Circuit's opinion.

4 After discussing at length why it's going to
5 reject Lawson's arguments with respect to the scope of
6 Your Honor's injunction, there's a sentence at the end
7 that I think is very interesting that Lawson hasn't
8 mentioned in any of its briefs. And what it says
9 there is it says, rejecting Lawson's arguments that
10 somehow Lawson was authorized to actually sell the
11 products, it says, It just so happens that because of
12 the district court's enforcement of the discovery
13 rules, ePlus was not permitted to present any evidence
14 of damages.

15 That does not mean that Lawson was authorized
16 to sell products that infringe ePlus's patents. So I
17 think it's interesting. I don't think that the
18 Federal Circuit could have been any clearer in a
19 section where they are discussing the injunction, they
20 say specifically, the panel says, There is no
21 authorization for Lawson to sell the products. It's
22 not in the section that concerns Claim 26. It's in
23 the section of the opinion that concerns the
24 injunction.

25 I would urge Your Honor to focus on that

1 particular section when you consider whether or not
2 Lawson's request to modify the injunction and permit
3 them to sell the product is appropriate.

4 Now, on the issue of contributory
5 infringement, I'd like to turn to slide 3, please.
6 What Lawson is essentially asking for --

7 THE COURT: Slide what?

8 MR. STRAPP: Slide 3. The legal basis, I
9 think, of Lawson's alternative argument regarding its
10 request for permission to sell configurations 3 and 5
11 even though its customers will then use those
12 configurations to infringe Claim 26, is the notion
13 that it should be permitted to do so because that sale
14 wouldn't somehow infringe Claim 26. That sale alone
15 because Claim 26 is a method claim. That's their
16 legal argument.

17 Now, that legal argument, I think it's wrong
18 for a few reasons, but let me just first suggest that
19 it's wrong because if Lawson is selling configurations
20 3 and 5 to its customers, and its customers are using
21 configurations 3 and 5 to practice Claim 26, Lawson is
22 liable as a contributory infringer under Section
23 271(c).

24 At slide 6, we have reproduced the language
25 of Section 271(c) in its entirety. 271(c) says, in

1 part, "Whoever offers to sell or sells within the
2 United States a component of a patented machine,
3 manufacturer, combination or composition or a material
4 or apparatus for use in practicing a patented process,
5 and the word "process" there is directed -- and this
6 is at slide 6. The word "process" is directed to a
7 method claim here. Constituting a material part of
8 the invention knowing the same to be especially made
9 or especially adapted for use and not a stable article
10 suitable for substantial non-infringing uses shall be
11 liable as a contributory infringer.

12 Now, Lawson argues that this section is
13 irrelevant because there are substantial
14 non-infringing uses. I think you posed the question
15 to Mr. Thomasch, Well, where is that in the record?
16 And Mr. Thomasch said, Well, it's self-evident.

17 Now, I understand Mr. Thomasch thinks it's
18 self-evident that there are substantial non-infringing
19 uses, and that's his read of the Federal Circuit
20 opinion, but I would submit that that isn't sufficient
21 to prove that there are substantial non-infringing
22 uses.

23 In fact, I would suggest that if we turn to
24 slide 8, you may recall that this issue actually came
25 up in the post trial proceedings. Now, at the time of

1 the verdict, the jury had a verdict form that said, Do
2 you find direct infringement? And do you find
3 indirect infringement either by contributory
4 infringement and/or inducement of infringement of
5 Claim 26? And the jury checked yes.

6 So a JMOL was filed by Lawson that said that
7 is an inappropriate finding because there was no basis
8 on which the jury could or should have found that
9 Lawson is a contributory infringer with respect to
10 Claim 26. Your Honor heard that motion and docket 787
11 rejected the argument. You said, The jury heard and
12 received substantial evidence to support a finding of
13 indirect infringement on either an inducement or
14 contributory infringement basis.

15 At slide 10, what we've done is we've
16 produced some -- and I'm sorry I'm jumping around
17 here, but this is a little out of order.

18 On slide 10, what we have reproduced here on
19 the left side are quotes from Lawson's appeal brief to
20 the Federal Circuit. The top is a brief they filed in
21 August 2011. And the bottom quote is from a brief
22 they filed in February 2012. And what's interesting
23 was that Lawson chose to appeal this issue. After the
24 JMOL that was decided by Your Honor, Lawson said to
25 the Federal Circuit, ePlus did not prove that Lawson

1 is a contributory infringer and substantial evidence
2 does not establish contributory infringement.

3 Now, the Federal Circuit didn't expressly
4 take this head-on one way or the other in its opinion.
5 In fact, there's no mention of contributory
6 infringement one way or the other, but if you turn to
7 the end of the Federal Circuit's opinion, the very end
8 of the opinion, after the conclusion, there's a
9 footnote 2, and it says in the footnote 2, and I
10 quote, "To the extent that we have not addressed any
11 of the parties' arguments on appeal or cross appeal,
12 we have determined them to be unpersuasive."

13 And I think that the simple and natural
14 reading of that footnote in the Federal Circuit's
15 opinion is that because Lawson's argument regarding
16 contributory infringement was not addressed, that the
17 Federal Circuit determined it to be unpersuasive.

18 So I would submit, Your Honor, that Lawson --
19 the finding that Lawson is a contributory infringer
20 with respect to Claim 26 is the law of the case. That
21 cannot be varied coming back here on reconsideration
22 of the injunction. And to the extent that Lawson is
23 asking Your Honor to modify the injunction and to
24 permit sales, essentially what that is is a request
25 for Your Honor to retry liability issues that have

1 been finally decided and affirmed by the Federal
2 Circuit.

3 And we would submit that that would exceed
4 the power of a district court on remand.

5 THE COURT: How do you deal with the cases of
6 *Ricoh v. Quanta*, *Ormco v. Align Tech*, *Joy Techs*,
7 *Standard Havens Products*, all of which -- let's see.
8 *Muniauction, Inc.* and *BMC v. Paymentech*, all of which
9 stand, says Lawson, for the proposition that mere sale
10 of a product by the manufacturer cannot constitute
11 direct infringement of a method claim.

12 MR. STRAPP: We agree wholeheartedly with
13 that position. And I'll tell you why. Your Honor,
14 direct infringement is found under Section 271(a) of
15 the patent statute. What I'm talking about is
16 contributory infringement, which is indirect
17 infringement under 271(c).

18 THE COURT: The fact that there's indirect
19 infringement warrants the injunction against the sale.

20 MR. STRAPP: That's correct.

21 THE COURT: And indirect infringement has
22 been adjudicated by the Federal Circuit and resolved,
23 is now the law of the case, and that's the end of it
24 all.

25 MR. STRAPP: That's correct.

1 THE COURT: Okay.

2 MR. STRAPP: Just one more point on this
3 contributory infringement before I move on.

4 You heard Mr. Thomasch talk about substantial
5 non-infringing uses, and if I could direct Your Honor
6 to slide 9 because I think it's interesting. It's not
7 the first time in this case that we've heard about
8 substantial non-infringing uses. In fact --

9 THE COURT: Is it your burden to show there
10 are substantial non-infringing uses?

11 MR. STRAPP: Your Honor, it's our burden to
12 prove contributory infringement, and yes, that's part
13 of the proof.

14 THE COURT: Your point on that is that you've
15 proved it?

16 MR. STRAPP: That's correct. In fact, Your
17 Honor, at the trial the only evidence that came in, it
18 came in unrebutted, was from Dr. Weaver. This was
19 back in January of 2011. That each element of
20 contributory infringement including the no substantial
21 non-infringing uses element was adduced as evidence,
22 elicited from the testimony of Dr. Weaver and went
23 unrebutted from Dr. Shamos at trial. And that was
24 part of the reason that Your Honor upheld the finding
25 of contributory infringement in the JMOL decision in

1 August of --

2 THE COURT: That's already been decided.
3 It's gone up on appeal and I can't change it now.

4 MR. STRAPP: That's correct, Your Honor.

5 THE COURT: Is that your point?

6 MR. STRAPP: That's my point.

7 THE COURT: All right.

8 MR. STRAPP: Now, just with respect to the
9 substantial non-infringing use point, at slide 9 when
10 Your Honor was considering whether to enter an
11 injunction and what the scope of any injunction that
12 should be entered would be, Lawson made an argument to
13 Your Honor, and this was on March 30, 2011, in a brief
14 entitled, Opposition to motion for permanent
15 injunction. It's docket 705. What they said to Your
16 Honor is, We don't believe an injunction should be
17 entered, but if one were to be entered, it should be
18 focused on the extra functionality that goes beyond
19 what's just at the core S3 level.

20 Now, Your Honor may recall at the time
21 configurations 2, 3 and 5 were found to be infringed.
22 Configuration 1 was not infringing. Configuration 1
23 is just core S3. That's inventory control, purchase
24 order and requisition on top of LSF and process flow,
25 the foundation that's in yellow, you might recall.

1 And Lawson's argument then was, Well, what's
2 built on top of that in configurations 2, 3 and 5 are
3 this RSS, Punchout and EDI box. So if Your Honor is
4 inclined to enter an injunction, limit it to RSS,
5 Punchout and EDI. And Your Honor rejected that
6 argument. You said in your May 23 opinion that --

7 THE COURT: You're saying, your argument was
8 if you're inclined to enter an injunction, then limit
9 it to those?

10 MR. STRAPP: Right. That was the argument
11 that Lawson made. And that was an argument that Your
12 Honor rejected. Your Honor said, According to Lawson,
13 only RSS and Punchout should be enjoined. Lawson's
14 premise is simply wrong.

15 Now, the reason why Your Honor found that
16 premise simply wrong is that the evidence that came in
17 at trial was that configurations 2, 3 and 5 are
18 modular. They are made up of several different
19 modules. They're not just limited to
20 configurations -- sorry. It's not just limited to RSS
21 and Punchout. It's made up of several different
22 modules.

23 In fact, just going back for a moment to the
24 Federal Circuit's opinion in this case because the
25 Federal Circuit affirmed the finding that Your Honor

1 made in that regard. At page 514 of the Federal
2 Circuit's opinion, the Federal Circuit specifically in
3 its discussion of what the accused product was talked
4 about the different functionality of each of these
5 modular building blocks that make up the
6 configurations and explicitly found that the different
7 modular building blocks have important and integrated
8 functionality that forms the whole.

9 In other words, the whole isn't just one
10 module or just two or three modules as Lawson seems to
11 urge Your Honor to understand and believe, but rather
12 it was the configuration in its entirety.

13 THE COURT: Excuse me just a minute.

14 MR. STRAPP: It was a configuration in its
15 entirety. And for that reason Lawson's argument that
16 the injunction that was about to be entered should be
17 just limited to RSS and Punchout was rejected.

18 Now, here --

19 THE COURT: In following the sentence that
20 says Lawson is simply wrong, the following appears:
21 The only acts the injunction may prohibit are
22 infringement of the patent by the adjudicated devices
23 and infringement by devices not more than colorably
24 different than the adjudicated devices. As reflected
25 in the jury verdict form, the jury found that:

1 (1) Lawson's Core S3 Procurement System and
2 RSS infringes Claim One of the '172 Patent directly
3 and indirectly. That no longer flies.

4 (2) Lawson's Core S3 procurement system RSS
5 and Punchout infringes claims 3, 26, 28 and 29 of the
6 '683 Patent, and Claim One of the '172 patent. None
7 of that flies except the Claim 26 of the '683, and

8 (3) Lawson's Core S3 Procurement System, RSS,
9 Punchout and EDI infringes Claims 3, 26, 28 and 29 of
10 the '683 Patent. And Claim One of the '172 patent.
11 None of that flies except for Claim 26 of the '683
12 patent, directly and indirectly.

13 MR. STRAPP: That's correct, Your Honor.

14 THE COURT: All right. Then there's a
15 stipulation that Lawson's M3 e procurement software
16 infringes Claim One of the '172 Patent and Claims 3,
17 26, 28 and 29 of the '683 Patent, directly and
18 indirectly.

19 How much of that remains now of that
20 stipulation? They have stipulated to infringement of
21 that part of it.

22 MR. STRAPP: That stipulation remains in full
23 force and effect.

24 THE COURT: All right. So now once you do
25 that, what happens to the argument that the injunction

1 can remain just as to Claim 26?

2 MR. STRAPP: Well, Your Honor, just as to
3 Claim 26 --

4 THE COURT: As to configurations 3 and 5.

5 MR. STRAPP: Right. So maybe I could turn,
6 Your Honor -- direct Your Honor's attention, if Your
7 Honor is inclined to reconsider and address and is
8 interested in the evidence that was presented two
9 years ago --

10 THE COURT: No, I'm interested in asking you
11 how I can do that?

12 MR. STRAPP: Well, I have two answers.

13 THE COURT: Okay.

14 MR. STRAPP: The first answer is we would
15 submit that Your Honor should not go back and
16 reexamine the evidence. We don't believe that's
17 necessary in this instance. But let me --

18 THE COURT: Reexamine the evidence? I don't
19 think I do that anyway at this injunction in respect
20 of my question.

21 My question is, how can you reach -- let's
22 assume that I do what you want me to do. How can the
23 injunction in that context with those findings and the
24 results of the Federal Circuit reach what you want me
25 to reach?

1 MR. STRAPP: Well, Your Honor, the evidence
2 that was presented at the injunction hearing and the
3 decision Your Honor made at that time included and
4 encompassed Claim 26 and configurations 3 and 5. That
5 was part of the finding.

6 The evidence at that time Your Honor found
7 supported an injunction that was directed to
8 configurations 3 and 5 and supported that injunction
9 specifically because Claim 26 was found infringed.

10 Now, that's now the law of the case. That's
11 been taken up to appeal. The Federal Circuit has
12 said, We have substantial evidence. We find there's
13 substantial evidence that Lawson itself infringes
14 Claim 26, and that Lawson's customers infringe Claim
15 26, and that Lawson is indirectly infringing Claim 26
16 that's all explicit in the Federal Circuit's opinion.

17 Now, the question is: What do you do with
18 that?

19 What we would suggest, Your Honor, is that
20 since you've already made findings sufficient to
21 justify and enter an injunction that would cover Claim
22 26, that would cover configurations 3 and 5, because
23 of the evidence adduced two years ago, nothing that's
24 happened subsequent to that disturbs that finding from
25 two years ago.

1 THE COURT: I see.

2 MR. STRAPP: That's our position. Now, if we
3 look back at what that evidence was that supported the
4 finding that you made, which was that an injunction
5 was appropriate as to Claim 26 and configurations 3
6 and 5, a finding you made two years ago, I think what
7 we'll find is that evidence is still true today with
8 respect to the universe we're living in where
9 only Claim 26 is --

10 THE COURT: All right. Are you through with
11 the part of your argument where you don't address the
12 four factors or do you have other parts of it?

13 If you do, go ahead and make it. I want to
14 talk about the other, but I'm willing to have you -- I
15 interrupted you with a question that sort of
16 overlapped both questions. I don't mean to cut you
17 off.

18 MR. STRAPP: I just want to make one more
19 point on this part of the argument and that is the
20 inducement point. Could we turn to slide 5, please?

21 THE COURT: What point?

22 MR. STRAPP: Inducement.

23 So we discussed direct infringement, which is
24 271(a) and contributory infringement, which is 271(c).
25 I want to just briefly discuss inducement of

1 infringement. This is slide 5, which is 271(b).

2 The statute reads that whoever actively
3 induces infringement of a patent shall be liable as an
4 infringer.

5 Now, when the Federal Circuit considered
6 whether there was evidence to support a finding that
7 Lawson induced infringement of Claim 26, it answered
8 in the affirmative. It said there was substantial
9 evidence to support a finding of inducement.

10 Now, the question then becomes whether or not
11 a finding of inducement can support an injunction that
12 would prohibit sales of an infringing configuration.

13 I've already displayed some cases in which
14 the Federal Circuit has found such an injunction, and
15 what we would submit, Your Honor, is that by
16 installing and maintaining and instructing and
17 training its customers on how to use configuration 3
18 and 5, in conjunction with selling those customers
19 configuration 3 and 5, Lawson is inducing infringement
20 and it would be ongoing infringement for them to
21 continue selling it. Therefore, for that reason, in
22 addition to the reasons I've already mentioned, an
23 injunction that remains in full force including with
24 respect to sales is appropriate.

25 Let me turn now, Your Honor, to the four

1 factors and --

2 THE COURT: Let's take irreparable injury.

3 MR. STRAPP: All right. Let's start off with
4 irreparable injury.

5 THE COURT: Are ePlus and Lawson head to head
6 competitors in the eProcurement software marketplace?

7 MR. STRAPP: They were in March 2011. They
8 are today, in April 2013.

9 THE COURT: There's no evidence that that's
10 changed?

11 MR. STRAPP: That's correct, Your Honor. If
12 I could direct your attention to slide 17, please.
13 This was evidence -- this is just a small sampling of
14 evidence that Your Honor found two years ago at the
15 injunction hearing. And this evidence, it's both
16 relevant to configurations 3 and 5 in Claim 26, and
17 it's still true today just as it was back then.
18 There's no evidence otherwise.

19 First of all, ePlus practices its patents.
20 It's got Product, Content+ and Procure+ as Your Honor
21 found, that practices all of the elements of each of
22 the claims that were at issue then including Claim 26,
23 which is at issue now.

24 THE COURT: By that what do you sell that
25 competes head to head with configuration 3 and 5?

1 MR. STRAPP: Content+ and Procure+.

2 THE COURT: Nothing has changed there?

3 MR. STRAPP: That's right, Your Honor. In
4 fact, Your Honor, I think you may have in front of you
5 your opinion from May 23, 2011.

6 THE COURT: I live with it under my pillow.

7 MR. STRAPP: Well, if I could direct Your
8 Honor's attention to page 17 of that opinion. If you
9 could go toward the bottom of the page, there's a
10 sentence that starts, "According to Lawson." So this
11 is evidence that Your Honor found that Lawson had
12 presented. And what you say here is according to
13 Lawson, when customers buy its Core S3 Procurement
14 System, and that's just configuration 1, they
15 generally do so with the intent to purchase more
16 Lawson offerings. So additional modules like RSS and
17 Punchout.

18 Now, a customer of Lawson who has Core S3 and
19 adds on RSS and Punchout has configuration 3. Now,
20 Your Honor said that at the bottom of this page 17
21 there's no dispute that ePlus does not compete in the
22 ERP market, and Lawson does not compete in the best of
23 breed market. But if we flip over to page 18, what
24 Your Honor found is while RSS and Punchout only work
25 with Lawson's Core S3 Procurement System, the S3

1 system, that's just the core alone, so configuration 1
2 is configured to allow for integration with a stand
3 alone eProcurement product such as Procure+ and
4 Content+.

5 THE COURT: Is that changed by anything on
6 appeal?

7 MR. STRAPP: That has not changed on appeal.
8 That record still holds true today. And Your Honor
9 found that, thus, when an existing Lawson Core S3
10 Procurement customer who does not own RSS or Punchout
11 is seeking further functionality with respect to
12 eProcurement software, the two companies' products
13 compete against each for that business.

14 THE COURT: How does that apply to
15 configuration 3 and 5 alone?

16 MR. STRAPP: Well, because, Your Honor,
17 configuration -- a customer of Lawson -- let's say we
18 have a customer of Lawson who has configuration 1.
19 They decide they want to add on RSS and Punchout
20 functionality. They want to become a customer of
21 Lawson who owns configuration 3. They've got two
22 options, as Your Honor found. I mean, among other
23 options in the marketplace, but two of the options
24 they have are to either go back to Lawson and say,
25 Hey, we want to license RSS and Punchout from you and

1 get maintenance and service from you. Or they can
2 call ePlus and say, you know, We're a little bit tired
3 of dealing with Lawson. We want a new guy. And we
4 want you to show us what your Content+ and Procure+
5 can do if you integrate those modules with our Core
6 S3. So that's an instance of competition.

7 Now, if Lawson were enjoined from selling,
8 maintaining and servicing configurations 3 and 5, that
9 would give ePlus a chance to go to customers of Lawson
10 who have got Core S3 procurement and say, We know you
11 can't sell or license or maintain Punchout or EDI. We
12 think we've got a good solution if you're interested
13 in that functionality. That solution would be
14 Content+ and Procure+.

15 THE COURT: Is there anything on appeal that
16 upsets the finding that evidence of direct competition
17 is found and the fact that both companies are
18 similar-sized companies, and the same customers are in
19 specific industries including healthcare, retail and
20 education to name a few?

21 MR. STRAPP: No, there's been nothing that --

22 THE COURT: In other words, does the
23 invalidation in configuration 2 affect that finding?

24 MR. STRAPP: No, Your Honor.

25 THE COURT: Was it contended to that end on

1 appeal?

2 MR. STRAPP: No, Your Honor. In fact, one
3 interesting thing to note, I did read earlier from the
4 Federal Circuit's appeal decision on ePlus, and
5 there's a section of that appealed decision that
6 concerns the injunction arguments that were made by
7 Lawson. Now, Lawson had different arguments it could
8 choose to make regarding the injunction. One argument
9 that was not make by Lawson --

10 THE COURT: You mean on appeal?

11 MR. STRAPP: On appeal.

12 One argument that was not made by Lawson on
13 Appeal was that Your Honor's interpretation of the
14 four-factor test, an application of that test to the
15 facts that were on record was somehow erroneous or an
16 abuse of discretion. That argument was never made by
17 Lawson.

18 I think, in a sense, because Lawson chose not
19 to make that argument then, there's a waiver, and they
20 shouldn't be permitted to make it now because the
21 state of the injunction that existed then was such
22 that they were prohibited from using, selling,
23 offering to sell, maintaining, etc., with respect to
24 configurations 3 and 5 and Claim 26.

25 Lawson could have said, That finding isn't

1 supported by the evidence that was put forward in
2 front of the District Court in March and April of
3 2011. They chose not to make that argument. To make
4 that argument for the first time on remand, I would
5 argue they should be barred from doing so under *res*
6 *judicata*, principles of collateral estoppel and under
7 the theory waiver.

8 Other findings that Your Honor made that we
9 believe support irreparable harm here include the fact
10 that ePlus has had to divert substantial resources
11 from its business in order to enforce its patent
12 against Lawson, that ePlus has lost sales and market
13 share resulting in lost revenue and lost opportunities
14 to cross sell and up sell other ePlus products. And,
15 as Your Honor said, Lawson and ePlus market and sell
16 to companies in the same industries. Companies with
17 market caps in the 50 million to \$2.5 billion range.
18 The exact same companies in certain instances.

19 And, Your Honor, for example, even found that
20 there was one instance of a lost sale that ePlus knew
21 about where ePlus had lost a customer to Lawson who
22 had chosen to buy configuration 3, that is with RSS
23 and Punchout. That was Deaconess Hospital.
24 Obviously, that finding is relevant, as relevant today
25 as it was then.

1 And Your Honor also found that in several
2 instances ePlus and Lawson do not even know when
3 they're competing against each other because of the
4 secretive nature of the way that companies go out and
5 bid in this marketplace.

6 Your Honor also found with respect to
7 irreparable harm that third party analyst reports
8 group the two companies as competitors in the software
9 market. So it wasn't just ePlus saying that they were
10 competitors, but that they were third parties saying
11 that as well.

12 THE COURT: Did you put into the record the
13 briefs on appeal?

14 MR. STRAPP: The injunction briefs?

15 THE COURT: The what?

16 MR. STRAPP: Which briefs are you referring
17 to?

18 THE COURT: Briefs on a appeal that led to
19 the Federal Circuit's decision.

20 MR. STRAPP: I don't believe that that is --

21 THE COURT: They filed separate briefs on
22 injunction alone or did they deal with it all?

23 MR. STRAPP: I misunderstood Your Honor. I
24 don't think we put into the record in this proceeding
25 the appeal briefs that were filed by the parties. If

1 Your Honor would request that, we are happy to do so,
2 obviously, if you think that that's advisable.

3 THE COURT: Excuse me. Go ahead.

4 MR. STRAPP: So those are some of the
5 findings that relate to irreparable harm which still
6 hold true today, and I don't think that Lawson has
7 made a contention in its papers, and certainly hasn't
8 made one today in the oral argument, that those
9 findings somehow are not relevant or should be
10 discarded in light of the Federal Circuit's decision.

11 THE COURT: What they are saying, Yes, they
12 are arguing that. They're saying that because of
13 configuration 2, and because of the drop out of the
14 case, and all the patents, and the only thing being
15 left is Claim 26 of the '683 Patent, it's just
16 inequitable to have an injunction here. That's one
17 aspect of it relating to the third clause of 60(b)(5).

18 Then they say given that the appellate court
19 has vacated the findings respecting all of those other
20 claims and patents, you should never have issued the
21 injunction in the first place, and you need to relieve
22 us of that situation, or, alternatively -- that's the
23 *ab initio* argument. And I think that's pretty hard to
24 make, *ab initio*. But, alternatively, that under those
25 circumstances there isn't any irreparable injury here.

1 There's an adequate remedy at law. Your adequate
2 remedy at law is to go sue them if you believe that
3 there's infringement now that you've gotten
4 adjudication. And that failing those two things, I
5 ought to just acknowledge it and relieve them of the
6 burden of trying to comply with an injunction.

7 MR. STRAPP: Let me address both of those
8 points in turn. First of all, can we turn to slide
9 16, please. I want to turn -- I know we're talking
10 about irreparable harm, but I think Your Honor's
11 comment also relates to balance of the hardships.

12 THE COURT: Well, yes, they are actually
13 quite related concepts. You can't have the one
14 without the other.

15 MR. STRAPP: Right. What's very interesting,
16 and you can see here on the slide --

17 THE COURT: If you don't get irreparable
18 injury, you never get to the balance of the harms.

19 MR. STRAPP: That's correct, Your Honor.

20 Now, on the balance of the harm factor,
21 what's very interesting is that Lawson argued in their
22 brief during the injunction proceedings, this is
23 docket 705 at page 20, that Lawson had "hundreds of
24 existing clients which require Lawson to provide
25 maintenance and support services." And then they said

1 that those customers had no "viable alternative
2 sources for support other than Lawson."

3 So the argument that was made by Lawson at
4 the time was, We have 860 customers if you include
5 configuration 2. It's a large number of customers.
6 If we're not allowed to go out and maintain and
7 support our products, these customers are going to be
8 harmed. And a lot of them are hospitals. A lot of
9 them are public sector type companies. There's going
10 to be severe harm in the marketplace.

11 Now what they're trying to is sort of have
12 the other side of that argument, which is since
13 configuration 2 is no longer at issue and there's only
14 150 customers, therefore, ePlus shouldn't complain
15 about the harm because there's only a few customers.

16 Now, to me, it sounds like they're trying to
17 have their cake and eat it, too. They wouldn't
18 prevail the their argument then. I don't think they
19 should prevail on their argument now.

20 THE COURT: Other than that well-settled
21 legal principle that you can't have your cake and eat
22 it too, what authority do you have for that?

23 MR. STRAPP: Well, I would suggest, Your
24 Honor, that --

25 THE COURT: What legal underpinning is it?

1 MR. STRAPP: I would suggest, Your Honor,
2 that the fact that Lawson is continuing to sell and
3 maintain and service configurations 3 and 5 for 150
4 customers, and as the evidence showed, has made 20 to
5 \$30 million in revenue from doing so since the date
6 the injunction was entered is evidence that Your Honor
7 can take note of that there is ongoing harm to ePlus.
8 EPlus's patented property is being used by Lawson to
9 continue generating revenues.

10 THE COURT: What proof is there of that?

11 MR. STRAPP: Well, Your Honor, I'm assuming
12 that contempt is found. If contempt is not found, I
13 agree that that \$30 million was lawfully made by
14 Lawson or we would have the responsibility to file a
15 new infringement lawsuit if contempt is not found to
16 then seek the damages. But Lawson has been continuing
17 to use configurations 3 and 5. We know that --

18 THE COURT: Are you suggesting that I can use
19 the evidence from the contempt hearing as part of the
20 process of deciding the injunctive motion here?

21 MR. STRAPP: I'm not suggesting that Your
22 Honor needs to even reach that question because --

23 THE COURT: Well, suppose I were to just tell
24 that you I'd like to decide the injunction question
25 right away before you-all ever brief the contempt

1 question. What evidence is there that warrants this
2 issue to be decided in the way you argue without
3 anything --

4 MR. STRAPP: Well, your Honor --

5 THE COURT: -- from the injunction hearing --

6 MR. STRAPP: I --

7 THE COURT: -- on the contempt hearing?

8 MR. STRAPP: As of the date of the injunction
9 proceeding, we know that there were over 100 customers
10 that Lawson had. It's not in dispute that Lawson had
11 over 100 of those customers that we mention for
12 configurations 3 and 5. They also had an additional
13 few hundred that were just configuration 2.

14 Now, the evidence that was put forward
15 respecting both configurations 3 and 5 and
16 configuration 2 at the time of the injunction hearing
17 was decided by Your Honor to be sufficient evidence to
18 support a finding that an injunction was appropriate
19 as to configurations 2, 3 and 5.

20 What I've shown you today, I hope, is that
21 that evidence still holds true. In other words --

22 THE COURT: How does that evidence hold true?
23 How do I know that?

24 MR. STRAPP: Because the fact of competition,
25 Lawson doesn't suggest there's no competition, that

1 finding is still applicable today. The fact that --

2 THE COURT: Well, I would think that
3 unless -- I would think your better argument is that
4 there's nothing in the record for me to make a finding
5 to change that holding unless I consider that which is
6 in the contempt record and reach the conclusion that's
7 opposite the one you want me to reach about whether or
8 not their conduct is infringing by allowing RSS to run
9 in parallel and by the way they use RQC.

10 So I guess my real question here is: Do you
11 or do you not take the view that I need to consider
12 any aspect of the evidence in the contempt hearing in
13 order to decide the injunction question? They want me
14 to decide the injunction question first. And they say
15 I should have decided it, and, frankly, I would have
16 probably decided it long ago had it not been for the
17 fact that you all had this mandamus petition, and then
18 we had the unfortunate loss of Mr. Robertson, and it
19 all -- everything kind of got slowed down. And then
20 when we picked things back up, we had already
21 scheduled this. And as I said before, I wanted to
22 get -- I was on your dance card and you were on mine,
23 and I wanted to get that wrapped up. But I until have
24 to decide the case.

25 Now, if I were you, I would articulate an

1 objection to that rambling statement and say "I don't
2 have to answer it because I don't know what you're
3 asking," and that would be a well-taken objection.

4 Now the question you do have to answer is in
5 perspective of where we stand now. Is it your
6 position that I can or cannot take into account any
7 evidence produced at the contempt hearing in deciding
8 the injunction case?

9 MR. STRAPP: I'm going to try to give you my
10 shortest and best answer, which is that it's not
11 necessary to take into account any of that evidence.

12 THE COURT: All right. Thank you.

13 MR. STRAPP: And the reason why is we believe
14 the record evidence as it stands supports an
15 injunction as we've suggested except with respect to
16 configuration 2 and claims 28 and 29.

17 THE COURT: Uh-huh.

18 MR. STRAPP: Now --

19 THE COURT: I thought I heard you say earlier
20 that you thought that it was -- they hadn't put on any
21 evidence that would dispel the findings that were made
22 at the injunction hearing insofar as the dissolution
23 of the injunction is concerned pursuant to their
24 motion. That was their burden.

25 MR. STRAPP: That's correct, Your Honor.

1 THE COURT: They didn't put on any evidence
2 and therefore that's the end of the matter.

3 MR. STRAPP: That's correct, Your Honor.
4 That's our position.

5 THE COURT: Is that part of your position or
6 not?

7 MR. STRAPP: That is part of our position.
8 Our position is -- let me see if I can clarify it and
9 clarify the confusion.

10 THE COURT: I'm not confused now. I just
11 wanted to make sure where we stood.

12 MR. STRAPP: Okay. Just to make sure that
13 it's clear on the record here that Lawson filed a
14 motion seeking modification or dissolution of an
15 injunction. It's our position that it's their burden
16 to carry that motion forward. And if they want to do
17 so with evidence, they can come forward with evidence.
18 They have chosen and waived the right to come forward
19 with evidence. They said they don't need any
20 evidence.

21 Our position is they can't meet their burden,
22 especially without any new evidence because the
23 evidence that existed as of the date the injunction
24 was entered is sufficient to support a continuing
25 injunction with respect to configurations 3 and 5.

1 THE COURT: All right. I understand.

2 MR. STRAPP: Now, Your Honor had also asked
3 about remedy at law, and Your Honor's question was,
4 Well, why not just let Lawson off scot-free and then
5 ePlus would have the opportunity to go ahead and sue
6 them again, and that could be their remedy at law and
7 that should be adequate?

8 I know that was a suggestion made by Lawson's
9 counsel. I'm not sure if it was made in all
10 seriousness or not, but I frankly --

11 THE COURT: I think what he was saying was in
12 response to one of the arguments you made was that you
13 would be without remedy, and he was saying that it
14 isn't all that unusual in the law that circumstances
15 occur where a party prevails but doesn't get a remedy.
16 And in this situation you are where you are because of
17 the ruling that was made with respect to the damages
18 expert and the fact that you eschewed your option
19 under *Pace* to seek an ongoing royalty, and that now
20 you can't satisfy the need for an injunction, and it
21 doesn't aid your cause in pursuit of an injunction to
22 say if you don't give us an injunction, we're without
23 a remedy.

24 I don't think I put it as eloquently as Mr.
25 Thomasch did, but isn't that, in essence, what you

1 were saying on that topic, Mr. Thomasch?

2 MR. THOMASCH: It is, Your Honor. And I
3 thought it was quite eloquent.

4 THE COURT: Oh, flattery, thy tongue.

5 MR. STRAPP: Your Honor, I think in your
6 opinion on the injunction from May 2011, what you said
7 was the question about an adequate remedy at law
8 inevitably overlaps what the question of whether a
9 patentee has suffered irrelevant harm.

10 And what you found in that injunction opinion
11 was that ePlus had demonstrated irreparable harm, and
12 that Lawson's argument that the injury inflicted on
13 ePlus could be satisfactorily addressed by some sort
14 of ongoing or running royalty was inappropriate.

15 One reason that Your Honor gave for that is
16 Your Honor decided that it would be too difficult to
17 parse out what the appropriate terms of a license
18 would be for an ongoing royalty in light of the record
19 evidence at that point.

20 Your Honor may recall that the five licenses
21 ePlus entered into, they are not part of this contempt
22 proceeding, but they are part of the trial record, and
23 those licenses had various components. They weren't
24 as simple as an ongoing royalty term and a license to
25 a patent. There were are all sorts of cross licenses

1 and --

2 THE COURT: I thought it was addressed in the
3 the injunction opinion.

4 MR. STRAPP: Right. And that's all set forth
5 in the injunction opinion.

6 In light of the complexity of those license
7 agreements that ePlus had negotiated when it had a
8 chance to do so with other companies, and in light of
9 the fact that there wasn't evidence about how a
10 royalty would be calculated at that point in the
11 record, Your Honor found that Lawson's request to
12 enter into an ongoing, compulsory license with ePlus
13 was inappropriate as opposed to the injunctive relief
14 that ePlus was instead seeking.

15 I think that Your Honor also found that in
16 light of the harm to ePlus that was difficult to
17 quantify, especially with respect to its inability to
18 cross sell and up sell its VAR, value added retail
19 products, in conjunction with Content+ and Procure+ as
20 well as additional harm to ePlus, that there was no
21 adequate remedy at law.

22 THE COURT: Was it briefed on appeal or upset
23 on appeal?

24 MR. STRAPP: No. That's the record as it
25 stands today.

1 Maybe I could turn to the public interest
2 factor because I think we've already talked about
3 balance of harms.

4 What's interesting about public interest is
5 that the arguments that -- a lot of the arguments that
6 Lawson made at the time about public interest appear
7 nowhere in their briefs, and I think it's for a good
8 reason.

9 The public interest arguments that were made
10 two years ago by Lawson, which were rejected by Your
11 Honor, were that there would be morale problems,
12 patient-care issues, loss of jobs at hospitals, that
13 Lawson's customers would have to pay 900,000 or a
14 million dollars and spend nine months implementing new
15 systems. And that testimony was based -- that
16 evidence was based on testimony from Mr. Hager.

17 Now, Your Honor took it into account in part
18 by including a sunset provision in the injunction.

19 THE COURT: That's why the sunset provision
20 was in.

21 MR. STRAPP: Correct.

22 THE COURT: It wouldn't have been put in if
23 it hadn't been for that testimony.

24 MR. STRAPP: Exactly, Your Honor. So the
25 sunset provision is part of the injunction because of

1 the testimony from Mr. Hager. That's the reason why
2 it was in the injunction. But Your Honor said, I'm
3 going to address the public interest argument that's
4 being paid by Mr. Hager through a sunset provision,
5 but I still believe that the public interest factor
6 still weighs in ePlus's favor, and I'll do a sunset
7 provision, and I'll put it in the injunction. As the
8 Court sitting in equity, that's what you decided to
9 do. That's what remedy you decided was appropriate.

10 Now, the only thing I would submit that's
11 changed since then is that, frankly, we believe that
12 the evidence that Mr. Hager put on at trial wasn't
13 true. That may be the reason why this argument
14 doesn't reappear in Lawson's briefs now as to why the
15 public interest factor isn't satisfied. But certainly
16 if anything has changed with respect to public
17 interest, it's just that the arguments that Lawson had
18 made before, they have decided they are not going to
19 advance again with respect to Mr. Hager.

20 So if it weighted in our favor then, it's
21 certainly weighs in our favor now.

22 Those are the arguments I would make with
23 respect to each of the four factors. And I think that
24 I just want to address one more point that Mr.
25 Thomasch brought up in his argument.

1 Mr. Thomasch directed Your Honor to a portion
2 of ePlus's findings of fact and conclusions of law
3 that it submitted -- that it submitted as part of the
4 injunction proceedings in which ePlus said that -- it
5 submitted testimony from Lawson's witnesses that it
6 obtained at depositions in 2009, at the outset of this
7 case, when all the configurations were at issue,
8 including configuration 1. And that testimony that
9 ePlus put into the record at the time, it was
10 testimony from Mr. Hager and Mr. Lohkamp.

11 The testimony was, from Mr. Hager, that
12 Punchout does not drive S3 sales. And defendant has
13 never won a sale merely because of its Punchout
14 products. And that Mr. Lohkamp testified he wasn't
15 aware of a specific customer that would not have
16 purchased S3 if defendant didn't also offer
17 Procurement Punchout.

18 Now, I think it's important to understand two
19 things about that.

20 THE COURT: You just read from Hager's
21 testimony; is that what you're saying?

22 MR. STRAPP: I'm reading from our brief. Let
23 me just put into the record. So this is ePlus's
24 brief -- I'm sorry. This is Lawson's memorandum in
25 support of its motion, its Rule 60(b) motion. So this

1 is the brief that was just filed by Lawson. Docket
2 1012 at page 19 and 20. This is where Lawson is
3 quoting from the testimony that Mr. Hager and Mr.
4 Lohkamp offered that was part of the injunction
5 proceedings.

6 So if you turn to page 19 of Lawson's
7 brief --

8 THE COURT: Which brief?

9 MR. STRAPP: This is Lawson's memorandum in
10 support of Rule 60 motion to dissolve or modify the
11 injunction. And it's docket 1012, page 19.

12 THE COURT: Page 19 is a certificate of
13 service.

14 MR. STRAPP: I'm sorry, Your Honor. This is
15 actually Exhibit A to the brief. That's why I was
16 confused. Exhibit A to Lawson's memorandum in
17 support --

18 THE COURT: It was ePlus's Rule 26 rebuttal
19 disclosure concern injunctive --

20 MR. STRAPP: Correct. Correct. I'm sorry.
21 It's my confusion here.

22 In Exhibit A to Lawson's brief, which is
23 ePlus's rebuttal disclosure at page 19 and page 20,
24 this is what Mr. Thomasch was directing your attention
25 to earlier today. If you turn to page 19 and then

1 carrying over to page 20, you'll see that there's
2 quotes from a Hager deposition transcript, a
3 deposition transcript of Mr. Lohkamp. These are from
4 October 2009.

5 Now, in October 2009, as Your Honor may be
6 aware, ePlus was pressing forward with its case that
7 configurations of 1, 2, 3, 4 and 5 were infringed.
8 So, in other words, at that point in the pretrial
9 proceedings, all the configurations were at issue.
10 Not just configuration 2, not just configuration 3 and
11 5.

12 Configuration 1 of Lawson, the record showed
13 at the time had -- Lawson had almost 2000 customers
14 for configuration 1. So if we understand that at the
15 time that Mr. Lohkamp and Mr. Hager offered this
16 testimony with respect to whether Punchout was driving
17 sales of S3, and S3 is just the core procurement,
18 that's configuration 1, their testimony was, No. And
19 that's easily understandable. If there's only 150
20 customers that have Punchout, right, and 1800 do not,
21 then those 1800 who have chosen not to license
22 Punchout don't want Punchout, don't need Punchout, and
23 Punchout isn't driving the sales for configuration 1.

24 But let's focus on what's at issue here in
25 this proceeding. What we're dealing with is a

1 universe of 150 customers, each one of which has
2 decided to license Punchout. A customer wouldn't pay
3 Lawson just as a matter of logic extra money for
4 license, maintenance and service for Punchout unless
5 they wanted license, maintenance and service for
6 Punchout.

7 In other words, a customer of configuration 1
8 who doesn't have Punchout might not care about
9 Punchout, but a customer who has made the decision to
10 pay extra money to Lawson to get the Punchout module,
11 obviously wants and needs and desires Punchout so that
12 they can use Punchout as part of a system that they
13 have licensed from Lawson.

14 I guess -- let me just also address here
15 before I close the Apple Samsung case that Mr.
16 Thomasch focused on as well. The Apple Samsung case,
17 that's a Federal Circuit decision from 2012, and
18 that's a preliminary injunction case in which the
19 Federal Circuit is applying the standard for
20 preliminary injunctions set forth in the *Winter v.*
21 *NRDC* case. That's a 2008 Supreme Court decision, 555
22 U.S. 7. That's the standard for preliminary
23 injunctions.

24 As Your Honor knows, what we're dealing with
25 here is a permanent injunction. Your Honor applied

1 and took into great consideration the four factors set
2 forth in the *eBay* case. That's a Supreme Court
3 decision from 2006 that set out the test for the
4 four-factor permanent injunction relief and issued a
5 63-page opinion finding that those factors were met.

6 So we would submit that this Apple decision
7 really has no relevance to these proceedings.

8 THE COURT: You're saying that you have to
9 establish a causal nexus that relates the harm to the
10 alleged infringement and you haven't done that.

11 MR. STRAPP: Your Honor, that's what Mr.
12 Thomasch is saying, but we would submit that we
13 have -- first of all --

14 THE COURT: Why do you say you have done it?

15 MR. STRAPP: Well, first of all, let me just
16 point out that in the *eBay* case, the words "causal
17 nexus" don't appear in the four-factor test. And the
18 four factors in *eBay* are different than the four
19 factors in the *Winter* test, the preliminary injunction
20 test.

21 The factors in the *eBay* test for permanent
22 injunctions are (1) whether the plaintiff has suffered
23 any irreparable injury, (2) that remedies available at
24 law such as monetary damages are inadequate to
25 compensate for that injury, (3) considering the

1 balance of hardships, a remedy in equity is warranted,
2 and (4) that the public interest would not be
3 disserved.

4 Now, the *Winter* factors for preliminary
5 injunction are (1) that the plaintiff is likely to
6 succeed on the merits. That doesn't appear in *eBay*.
7 (2) that the plaintiff is likely to suffer irreparable
8 harm in the absence of preliminary relief. That's
9 different from the irreparable harm test that's stated
10 in *eBay*. They may be similar, but it's different.
11 (3) that the balance of equities tips in its favor.
12 That's similar to the balance of hardships test, and
13 (4) that an injunction is in the public interest.
14 And, again, that's similar to the *eBay* test.

15 But, again, these two tests are different
16 tests. They are similar, but they're not the same.

17 THE COURT: But he's saying the irreparable
18 injury component of the *Winter* test as applied in
19 *Apple* and interpreted by the Federal Circuit shows
20 that you can't have irreparable injury unless you
21 establish a causal nexus. You have to show
22 irreparable injury, and then you also have to show
23 that the irreparable harm that you claim or have shown
24 is causally connected to the alleged infringing
25 conduct, I believe is what he was saying.

1 MR. STRAPP: Let me just make two points on
2 that issue on causal nexus. First of all, it's our
3 position that we substantiated and proved a causal
4 nexus between their infringement -- Lawson's
5 infringement of Claim 26 and the irreparable harm
6 suffered by ePlus. So we believe that that's in the
7 record. It's part of the record that was made during
8 the injunction proceedings. It's part of the reason
9 Your Honor entered a decision on the injunction in
10 ePlus's favor.

11 THE COURT: It's reflected in the irreparable
12 injury component of the opinion; is that what you're
13 saying?

14 MR. STRAPP: Yes, Your Honor, because Your
15 Honor specifically found in the irreparable injury
16 section of your opinion, which is the large bulk of
17 the opinion, that the injury to ePlus is causally
18 linked to the infringement by Lawson.

19 Now, at the time, as Lawson's has pointed
20 out, there were more than just one claim at issue.
21 There were several claims at issue. But never in your
22 findings did you suggest or did Lawson argue, either
23 then or afterwards, that somehow the evidence in the
24 findings were limited to the system claims or were
25 limited to Claim One of the '172 Patent.

1 Those findings included and encompassed a
2 finding of irreparable harm that was caused by
3 Lawson's infringement of Claim 26.

4 THE COURT: All right, Mr. Thomasch.

5 MR. THOMASCH: Yes, Your Honor. Thank you
6 for indulging both counsel. I'll try to get right to
7 specific points and move through this quicker than
8 initially.

9 I want to start near the end because Mr.
10 Strapp just told you that by his deductive reasoning
11 Punchout was important to customers with
12 configurations 3 and 5, and he suggested that Punchout
13 was driving sales of certain configurations.

14 There is absolutely nothing in the record
15 that supports that statement.

16 He then talked a lot about how we were
17 quoting from Mr. Hager and Mr. Lohkamp. Just to be
18 clear, Your Honor, we were quoting from plaintiffs.
19 The exhibit that we attached to our brief is a
20 document filed on March 31, 2011, by ePlus's counsel.
21 It is their statement of what facts they thought were
22 important. And those facts state on their face that
23 Punchout, the module that is in configuration 3 and 5
24 but not in configuration 2, they cite those facts to
25 show that Punchout is not a driver of sales.

1 Now, Mr. Strapp says for the first time,
2 Well, that's because we were talking about
3 distinguishing away from configuration 1. That's what
4 that was about.

5 He may be right. And in being right, he
6 proves my point. What went on below in the hearing in
7 2001 was in no way limited or segregated or isolated
8 to the one claim that is at issue and the two
9 remaining configurations.

10 If they put in evidence about configuration 1
11 and how people who had configuration 1 wanted to come
12 up to configuration 2, and they say that, they
13 specifically talk about if you don't have either RSS
14 or Punchout, well, the people who don't have either
15 RSS or Punchout are configuration 1 customers, and
16 they said, and they argued to you, there's competition
17 to sell that package of RSS and Punchout, and that
18 competition is between configuration 2 from Lawson or
19 Procure+ or Content+ from ePlus.

20 Well, that's fine, but that's not this
21 situation because configuration 2 contains RSS or RQC.
22 That's in configuration 2. Now the only issue is --
23 and we're entitled to compete with them on
24 configuration 2.

25 Now, the only issue is: Are we somehow

1 irreparably harming them because we also sell a
2 product that has Punchout in it? Maybe we can say,
3 Okay, Lawson has a configuration 2 customer, and
4 Lawson may want to sell that customer Punchout, which
5 would make it a configuration 3 customer, but they
6 have it already. And now they want to sell Punchout.
7 Well, do we compete with ePlus? EPlus hasn't put in a
8 word of evidence. They haven't cited you to anything
9 that suggests that they have a Punchout-only product.
10 Nobody would buy RSS and Punchout when you already
11 have RSS.

12 They haven't done anything that specifies
13 what part of the massive record that was in front of
14 Your Honor in 2011 remains applicable and they haven't
15 articulated why it's enough.

16 All they've said is there are things in there
17 that relate to Claim 28 and there are things in there
18 that relate to configurations 3 and 5. And I agree.
19 Yes, there are. It was all done in one collective
20 dump that all of these claims and all of these
21 configurations relate to competition between ePlus and
22 Lawson. And it did at the time.

23 But now the situation has changed. And Your
24 Honor asked question after question to Mr. Strapp. I
25 would sale them softball questions the way they were

1 phrased. But they were questions about whether or not
2 there was evidence to dispel aspects of what went --
3 where is the evidence? Does anything in this that
4 we're talking about affect the findings that were
5 previously made? And, specifically, in regard to
6 findings made in the memorandum opinion of Your Honor
7 dated May 23, 2011, docket 728, at pages 17 to 18.
8 You talk specifically about what's happened that
9 affects those findings.

10 And what has happened, Your Honor, is that
11 configuration 2, which we did not have the right to
12 compete with in 2011, we now have the right to compete
13 with. That changes everything.

14 THE COURT: All right.

15 MR. THOMASCH: And they don't address that
16 point.

17 So, Your Honor, the first point that he
18 started with was we hadn't put in evidence, that is
19 correct, and they hadn't put in evidence. And if the
20 evidence is in the record, if there's evidence in the
21 record that can be isolated and support the findings,
22 then they are entitled to an injunction. And if there
23 is not, then they failed your request and offer to
24 give them a chance to make up for that. Because it
25 would be a legitimate position for them to say, Well,

1 we were assuming that all these claims were infringed,
2 and we were assuming that configuration 2 was an
3 infringing configuration. How were we to know to
4 isolate and segregate our evidence?

5 Well, you gave them an opportunity. They did
6 not avail themselves of it.

7 You asked Mr. Strapp about the cases that
8 Lawson relies on. And then Mr. Strapp put up slide 13
9 and he said, Well, here are our cases. We've
10 addressed the cases at slide 13, in footnote 6 of our
11 reply brief at page 11, and at footnote 3 on page 9.
12 And the fact of the matter is that in each of those
13 situations, for instance, in the *Tristata Tech* case,
14 423 F.Supp 2d at 466 to 67, the Court specifically
15 said that the accused products "were not suitable for
16 substantial non-infringing uses."

17 In our brief, we deal with each of these
18 cases. In each case, there is not a substantial
19 non-infringing use. And the law is clear. The sale
20 of a product is never the direct infringement of a
21 method claim. Counsel acknowledged that. It might
22 seem counterintuitive. It's the law.

23 The law also does allow for the sale of a
24 product to indirectly infringe a method claim if the
25 patentee proves that the product being sold has no

1 substantial non-infringing uses. The patentee has not
2 and cannot prove that in this action.

3 The *Amado* case was mentioned only very
4 briefly and in part what was stated was incorrect. To
5 be clear, and it's a very clear decision, and well
6 worth Your Honor's time, the Supreme Court decision in
7 *eBay* was deemed not an intervening decision in that
8 case. The reason for that is an intervening decision
9 comes between the time of -- an intervening decision
10 if it's a Supreme Court decision would come after the
11 appeals court renders its decision, but before the
12 remand. That space there, that's the time for an
13 intervening decision.

14 What happened in *Amado*, clear from the
15 procedural history in the case is that when the
16 district court judge rendered his injunction, *eBay* had
17 not been decided by the Supreme Court. It went up on
18 appeal. The appeals were briefed. *EBay* had not been
19 decided.

20 Then *eBay* was decided. After briefing,
21 before oral argument. The Federal Circuit thought it
22 quite important that notwithstanding the importance of
23 *eBay*, Microsoft never brought *eBay* to the attention of
24 the court. Did not suggest that that influenced in
25 any way what was to happen or how the Federal Circuit

1 should address the injunction issues, which it was
2 attacking.

3 Microsoft ignored *the eBay* case. When it
4 went back down after the *eBay* case had issued, it went
5 down. The Federal Circuit decision postdates *eBay*.
6 So *eBay* comes out. The Federal Circuit comes down and
7 it doesn't say, By the way, consider this *eBay* case.
8 The Federal Circuit says, Remand to dispense the
9 funds.

10 And the district court judge said, But wait a
11 minute. It's not a question of what the mandate makes
12 me do. The question is what's fair to do. I issued
13 an injunction under a mistaken view of the law.

14 THE COURT: I asked if it was appropriate to
15 issue an injunction, not on anything else. There's a
16 big difference between what that rule is or what that
17 situation is and what we have here, it seems to me.

18 We have here the very clear understanding of
19 what the rules of law are respecting the issuance of
20 an injunction. And that doesn't necessarily -- I mean
21 there's no reason to -- and we also have a case where
22 the Federal Circuit -- you-all have argued your case
23 to the Federal Circuit. You had your right to take a
24 shot at the injunction. You took such shots as you
25 could take, as you felt like you were advised to take,

1 and the only thing the Federal Circuit did was say,
2 There's nothing wrong with the scope of the
3 injunction, but you have to go back and revise it now
4 and modify it in view of what we've done.

5 MR. THOMASCH: We took our shot at the
6 injunction, Your Honor.

7 THE COURT: Isn't that different than the
8 case you're talking about?

9 MR. THOMASCH: No. Actually, to flip back to
10 *Amado* for a minute, no, I think it is absolutely two
11 sides of the same coin. I think the injunction
12 analysis is taking a set of facts that have been
13 proven to the Court and then applying them to the law
14 of injunctions and seeing whether or not the facts are
15 sufficient.

16 And in *Amado*, they looked at the law, the
17 legal framework, and they said, Well, I had a
18 misapprehension of that legal framework at the time.
19 So, in fairness, I'll redo it.

20 Here, Your Honor, I submit you had a
21 misapprehension about the factual underpinning that
22 went into your decision. You believed the system
23 claims were valid and infringed. They are not. That
24 is a factual mistake that was made. It was made in
25 good faith, but it's real, and it has consequences.

1 And I don't see why in the world we would be in a
2 situation where that simply gets ignored. The
3 question is: If you go back and if you knew the facts
4 as they really exist, if you accepted the fact that
5 those method claims were invalid and should have never
6 come to trial. We were deserving of summary judgment
7 and didn't get it. If you accept the fact that the
8 jury did not prove Claims 28 and 29 were infringed.
9 On the evidence that was given to you, would you have
10 come out the same way? That's the analysis we asked
11 Your Honor to conduct. We think it's totally
12 appropriate to do so. *Amado* allows you to do so even
13 if it does not compel you to do so.

14 THE COURT: All right.

15 MR. THOMASCH: Your Honor, on the issue of
16 contributory infringement, the suggestion was somehow
17 made that the Federal Circuit decided that issue
18 against us. One, I don't believe the Federal
19 Circuit's decision speaks to contributory infringement
20 at all.

21 THE COURT: Did you raise the issue on
22 appeal?

23 MR. THOMASCH: I wasn't the appellate
24 counsel, put appellate brief for Lawson has in it a
25 paragraph on contributory infringement.

1 THE COURT: Then the Federal Circuit said
2 there's no merit to it. We haven't dealt with it
3 here.

4 MR. THOMASCH: It did not address it,
5 specifically. What I'm suggesting, Your Honor, is the
6 non-infringing use wasn't before the Federal Circuit.
7 The non-infringing use, which is the use of
8 configuration 2.

9 THE COURT: The non-infringing use was right
10 in front of the Federal Circuit by virtue of its own
11 decision. How can you say that? They made a
12 decision. And if they had felt like there was a big
13 problem with respect to contributory infringement,
14 they could have said, Hey, look, in view of our
15 finding on No. 2, you need to redo this question on
16 contributory infringement. Or they could have said,
17 The trial court must reconsider this question about
18 contributory infringement in view of our position on
19 configuration 2. And if they didn't do that, I don't
20 know how I have a license to do what you want me to
21 do.

22 MR. THOMASCH: One, because you're an Article
23 III judge. You have a license. You have a license to
24 do that.

25 THE COURT: A lot of people a say that

1 Article III judges have a lot of power, but I'll tell
2 you something. I adhere to mandates. I've seen what
3 happens to district judges who do not do what they are
4 told.

5 MR. THOMASCH: The decision of the Federal
6 Circuit in *Amado* is a decision about the mandate rule.
7 It is the Federal Circuit's decision on the scope of
8 the mandate rule. And in the statement that on
9 remand, a judge is not a robot, applies in this case.
10 I don't think that would ever fairly apply to Your
11 Honor, but it says you're not limited to what they
12 said.

13 THE COURT: Justice O'Connor expressed the
14 view about potted plants, if I remember correctly, and
15 district judges, and suggested that in certain
16 circumstances they are potted plants when it comes to
17 changing the law.

18 MR. THOMASCH: We are not asking for the
19 district court in this instance to change the law in
20 the slightest.

21 THE COURT: That's the point. They say you
22 are. You're asking me to change the law of the case
23 is what they're saying, as I understand their
24 argument.

25 MR. THOMASCH: And I would submit that the

1 law of the case does not touch on the issue of whether
2 or not configuration No. 2, now that the patent has
3 been deemed -- the patent claim at issue has been
4 deemed invalid, then we are free to compete in that
5 regard. It is a non-infringing use to use
6 configuration No. 2, and there's no possible way to
7 read the decision to the contrary.

8 It is impossible to suggest that somehow the
9 use of configuration 2 is infringing. They never say
10 that. Why not? Why don't they just say, The use of
11 configuration 2 is infringing?

12 THE COURT: Because the Federal Circuit said
13 no.

14 MR. THOMASCH: Exactly.

15 THE COURT: I assume that's why they said it.

16 MR. THOMASCH: Exactly. It was infringing in
17 2011. It's not infringing now. That's the new fact.

18 THE COURT: All right.

19 MR. THOMASCH: Very quickly on the adequacy
20 of money damages, whether or not anything would be.
21 Again, there is no showing that money damages would be
22 inadequate. There's never been a claim that money
23 damages would be inadequate. There's simply been a
24 desire not to have money damages because there is an
25 alternative remedy that they would prefer.

1 That isn't what inadequacy of money damages
2 means. They are not wrapped within the case law on
3 that issue at all. And on the question of public
4 interest, I don't really understand the argument made
5 other than maybe a chance to try to slam Mr. Hager,
6 but there's no possibility that we would be raising in
7 2013 the sunset provision as relating to whether or
8 not there should be an injunction today.

9 That's past. You entered a sunset provision.
10 That period has past. That public factor issue isn't
11 there.

12 We previously said, another issue, it was
13 right on the slide, was the reexamination proceedings.
14 Your Honor said those were too distant and uncertain
15 and that was the ruling. They are right there. They
16 are on the horizon right now. They are in the Federal
17 Circuit where the United States Government has taken
18 the position that the last claim in this case is
19 invalid, along with the other method claims of the
20 '683 Patent.

21 THE COURT: Am I to take comfort from the
22 fact that the United States Government takes a
23 position?

24 MR. THOMASCH: I think it's an important
25 consideration to think that the PTO has finished all

1 appeals. Every possible request for reconsideration
2 was made. Every one of them was denied. The issue is
3 now in the Federal Circuit. It's teed up. It's
4 briefed. And we have to await oral argument and a
5 decision. But in that decision comes down as an
6 affirmance, if the Court agrees with the position of
7 the government in that case, then all of this will
8 have been for naught because we would be in the same
9 position then as we are with the '172 Patent at the
10 moment.

11 If a patent is invalid, you can't predicate
12 infringement on it or anything else. And so it is a
13 factor, we say, to suggest that we did, you know, we
14 took into account -- I know that there's been loose
15 argument all the time about how we just ignored what
16 Your Honor said, and we trampled it. We did not.

17 And we were enjoined. We were enjoined on
18 the '172 Patent. And we changed the entire operating
19 system of RSS, not at issue in the contempt
20 proceeding, but a fact nonetheless. We did that
21 because we were enjoined under the '172 Patent.

22 As it turns out, we should have never had to
23 do that. We're not going to get a letter of apology
24 from ePlus, sorry about asserting that invalid patent
25 against you. But the prejudice to us was real.

1 And at this point when the system claims have
2 been invalidated and the federal government says the
3 method claims are invalid, we do think public interest
4 would be served by allowing that proceeding to play
5 out before we rush into another injunction, Your
6 Honor.

7 So those are all the points I have. I
8 believe that Mr. Krevitt wanted to correct one
9 statement that he made with respect to the Samsung
10 case, which is why I haven't mentioned that case
11 because I didn't want us double teaming on that.

12 MR. KREVITT: Your Honor, if I may very
13 briefly. As Mr. Thomasch noted, I was counsel for
14 Apple in that case and I am counsel for Apple in that
15 case, and argued the preliminary injunction motion.

16 Two quick things. First, I believe I
17 misspoke earlier. The time to file a petition to the
18 Supreme Court has not yet run.

19 THE COURT: I think you said that. You said
20 you weren't going to, though.

21 MR. KREVITT: And the second part is I
22 actually am not aware of intentions one way or another
23 as to what Apple intends to do regarding a possible
24 petition to the Supreme Court.

25 THE COURT: They may still file it.

1 MR. KREVITT: They very well may. The time
2 doesn't run until the end of this month. I believe
3 early next month.

4 The other point I would mention, having been
5 involved and remain involved in that case, is the
6 standard for a preliminary injunction and a permanent
7 injunction, an issue that Your Honor raised and Mr.
8 Strapp addressed, is the same. The Supreme Court held
9 that, Your Honor, in 1987 in the *Amoco Petroleum v.*
10 *Gamble* case, 480 U.S. 531.

11 The Supreme Court said the standard for a
12 preliminary injunction is essentially the same as for
13 a permanent injunction with the exception that the
14 plaintiff must show a likelihood of success on the
15 merits rather than actual success.

16 That case was cited by both *Winter*, which Mr.
17 Strapp mentioned, and *eBay*, approvingly. That's at
18 footnote 12 in the *Amoco* case on page 546.

19 The standards are the same. And it's an
20 important point, Your Honor, briefly because in the
21 *Apple* case, the Federal Circuit put in place this
22 causal nexus requirement. Actually, Your Honor, there
23 were two Apple Federal Circuit decisions.

24 There's an Apple 1, as we say, and then an
25 Apple 2. The Apple 1 decision came out in December of

1 2011. The Apple 2 decision is the one Mr. Thomasch
2 was addressing, which came out in October of 2012.
3 Both cases addressed the causal nexus requirement.
4 And the significant point, Your Honor, is in both
5 cases, the Federal Circuit found that Apple and
6 Samsung, not surprisingly, are competitors. They are
7 head-to-head competitors.

8 In fact, the district court found that it is
9 essentially a two-player market and found that there
10 is irreparable harm with the sale of the infringing
11 devices. But nonetheless found, and notwithstanding
12 the irreparable harm that Apple will suffer because
13 the harm is not directly caused by -- the patented
14 feature is not directly caused by the functionality
15 that was at issue in that case, there can be no
16 injunction. Preliminary or permanent.

17 In fact, Your Honor, following the Apple 2
18 decision about which Mr. Thomasch spoke, in October of
19 2011, the District Court, Judge Koh, in the Northern
20 District of California, had an opportunity to address
21 a permanent injunction in the first Apple case.

22 In the first Apple case, Apple 1 at trial
23 proved infringement. And Judge Koh, relying on the
24 Federal Circuit decision nonetheless, notwithstanding
25 the competition, nonetheless denied the permanent

1 injunction on the basis that a causal nexus had not
2 been established.

3 That's why Mr. Thomasch addresses it here.
4 It's critical to the extent that ePlus has already
5 conceded that Punchout is not driving the sales, the
6 causal nexus precludes an injunction, permanent or
7 preliminary, on the sales of configurations that have
8 Punchout.

9 THE COURT: If I find they actually did
10 concede that.

11 MR. KREVITT: That's correct, Your Honor.
12 Thank you.

13 THE COURT: All right.

14 MR. STRAPP: Your Honor, could I just make
15 one point before we close today? This is a short
16 point.

17 I just want to go back to where Mr. Thomasch
18 started a few hours ago. He said that Lawson's
19 principal argument is that the District Court, this
20 Court, should dissolve the injunction *ab initio*.
21 Those were his words.

22 Now, I just want to end with this. I think
23 there are two reasons why Your Honor shouldn't do
24 that. First of all, at the conclusion of the Federal
25 Circuit opinion when it directs the district court

1 about what to do, it says, Consider what changes are
2 required to the terms of the injunction consistent
3 with its opinion. Obviously, if there are going to be
4 changes to the terms of an injunction, that implies
5 that the injunction is not to be dissolved *ab initio*.

6 And then second, Mr. Thomasch pointed you to
7 the *Amado* case. Now, interestingly, the *Amado* case
8 says at 517 F.3d 1360 that in an instance like this
9 one where you have a mandate that doesn't suggest that
10 there can be dissolution, it says, in that case, the
11 mandate rule would prevent the district court from
12 dissolving the injunction *ab initio*. That's a quote
13 from that case.

14 THE COURT: Say that again.

15 MR. STRAPP: It says -- well, let me just
16 read the whole quote in context. It says,
17 Accordingly, the mandate rule operates as a bar to the
18 district court's reconsideration of the initial
19 issuance of the injunction. There is a fundamental
20 difference, however, between the granting of
21 retrospective relief and the granting of prospective
22 relief. While the mandate rule would prevent the
23 district court from dissolving the injunction *ab*
24 *initio*, it does not preclude the district court from
25 modifying or dissolving the injunction if it

1 determines that it is no longer equitable.

2 THE COURT: I, frankly, have always thought
3 that was the ruling.

4 MR. STRAPP: Right. Thank you, Your Honor.

5 THE COURT: I don't think that's a surprise
6 that you have that power, period. You've got it by
7 the mandate.

8 MR. STRAPP: I'm just suggesting, Your Honor,
9 that the notion that this could be dissolved *ab initio*
10 finds no support in the law and is contrary to the
11 federal rules.

12 THE COURT: It may or may not depending upon
13 the way I resolve the case, but the basic principle is
14 correct.

15 MR. STRAPP: Thank you.

16 THE COURT: If the mandate stops it, the
17 mandate stops it. If it doesn't, it doesn't.

18 MR. STRAPP: Thank you.

19 MR. THOMASCH: Your Honor, and the part that
20 was left out, that entire discussion was specifically
21 identified by the Court because it was not an
22 intervening decision. When it was not an intervening
23 decision, there was a different aspect of how you
24 handle retrospective relief.

25 THE COURT: Basically, you mean it was dicta

1 on the point?

2 MR. THOMASCH: No, it wasn't dicta in that
3 case. In that case, the timing of the decision was
4 such that Microsoft was aware of the Supreme Court's
5 decision and chose not to raise it with the Federal
6 Circuit. And then the Federal Circuit affirmed the
7 injunction. It was because of that.

8 THE COURT: Why didn't the Federal Circuit
9 address eBay?

10 MR. THOMASCH: I think they actually gave
11 Microsoft -- I believe it says they gave Microsoft the
12 opportunity and Microsoft didn't take the opportunity.

13 THE COURT: Strange workings.

14 All right. Thank you. It's submitted.

15 Now, there are a bunch of notebooks. I think
16 I may have created a problem. There are a bunch of
17 notebooks up here that you all have prepared for trial
18 and made part of the record, but you haven't used all
19 those things. What you have used are what's in the
20 witness binders. And I want you just to take all
21 of -- there's one set for ePlus and one set for
22 Lawson. Come get them. And take them. Don't take
23 anything in this first thing.

24 Mr. Neal?

25 THE CLERK: The top shelf?

1 THE COURT: No, this whole shelf leave.
2 Everything on the floor and on this shelf, the back
3 shelf, they take. I think ePlus's is on the floor.
4 And Lawson's is --

5 THE CLERK: As long as you leave these,
6 that's all we need to do?

7 THE COURT: I need everything on the first
8 shelf and my bench.

9 THE CLERK: And the second shelf is the only
10 shelf that goes then.

11 THE COURT: And the floor.

12 THE CLERK: And the floor. Okay.

13 THE COURT: Yes.

14 THE CLERK: I'll be glad to meet with the
15 paralegals tomorrow or tonight. It doesn't make any
16 difference to me. Whatever they want to do.

17 THE COURT: Okay. Is there anything else we
18 need to deal with? We set the date for the hearing on
19 the contempt; is that right?

20 MS. ALBERT: Yes, sir.

21 THE COURT: What have you done about Hager?

22 MR. STRAPP: This is it. Apparently, it's
23 been made while we were arguing this. Our argument
24 went on sufficiently so we had time to get this binder
25 ready. So I can hand this up to Your Honor.

1 THE COURT: All right. That will stay up
2 here on the desk and we'll clean all this up later.

3 All right. Thank you all. I'd like to say
4 something. There's been a lot of paperwork in this
5 case, and I think it's been very efficiently handled
6 by the legal assistants and the younger lawyers who
7 have worked on the case.

8 And notwithstanding the incompatibility of
9 our system and your system, the computer support has
10 been helpful where they could get it up, and we could
11 see it, and it was well organized. Nothing happened
12 in any way to slow down these proceedings.

13 So I appreciate it. And I appreciate having
14 the opportunity to work with lawyers who are prepared,
15 and know what they are doing, and give me all kinds of
16 problems in the decisional process.

17 Thank you. We are in adjournment.

18 (The proceedings were adjourned at 5:30 p.m.)

19 We, Diane J. Daffron and P.E. Peterson,
20 certify that the foregoing is a correct transcript
21 from the record of proceedings in the above-entitled
22 matter.

23 /s/

24 DIANE J. DAFFRON, RPR, CCR
/s/

DATE

25 P. E. PETERSON, RPR, CCR

DATE